

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1926

No. 4519.

354

REMBRANDT H. PEALE, APPELLANT,

vs.

DWIGHT F. DAVIS, SECRETARY OF WAR; HUBERT
WORK, SECRETARY OF THE INTERIOR; WIL-
LIAM M. JARDINE, SECRETARY OF AGRICUL-
TURE, ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED OCTOBER 29, 1926.

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DWIGHT F. DAVIS, SECRETARY OF WAR; HUBERT
WORK, SECRETARY OF THE INTERIOR; WIL-
LIAM M. JARDINE, SECRETARY OF AGRICUL-
TURE, AND THE FEDERAL POWER COMMISSION,
APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 4519.

REMBRANDT H. PEALE, Appellant,

vs.

DWIGHT F. DAVIS, Secretary of War, et al.

a Supreme Court of the District of Columbia.

In Equity.

No. 45607.

REMBRANDT H. PEALE, Plaintiff,

vs.

DWIGHT F. DAVIS, Secretary of War; HUBERT WORK, Secretary of the Interior, and WILLIAM M. JARDINE, as Members of and Composing the Federal Power Commission, Defendants.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill for Injunction.

Filed April 30, 1926.

Supreme Court of the District of Columbia.

In Equity.

No. 45607.

REMBRANDT H. PEALE

v.

DWIGHT F. DAVIS, Secretary of War; HUBERT WORK, Secretary of the Interior, and WILLIAM M. JARDINE, as Members of and Composing the Federal Power Commission.

To the Supreme Court of the District of Columbia, holding an equity court:

Rembrandt H. Peale, plaintiff, brings this his bill of complaint, on his own behalf and in his own right, against Dwight F. Davis, Hubert Work, and William M. Jardine, all citizens of the United States and residing in the District of Columbia, in respect of the matters and things hereinafter set forth. The plaintiff says:

I. That he is a citizen of the United States and of the State of Utah, his legal residence being Salt Lake City, in said State, and that he is now temporarily sojourning in the City of Los Angeles, in the State of California. That at the time of filing of this bill the defendants, Dwight F. Davis, Hubert Work, and William M. Jardine were and they now are the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture, respectively, of the Government of the United States of America, and, by virtue of the offices so held by them respectively, are all the members of and wholly compose and constitute the Federal Power Commission, and are sued as the members of such Commission.

II. That on November 4, 1899 one C. W. Clarke and Philomen Clarke, his wife, were the owners in fee simple of that certain tract of land in the County of Fresno, in the State of California, known and described as the east half

(E. $\frac{1}{2}$) of section thirty six (36), in township ten (10) south, range twenty seven (27) east, of the Mount Diablo Meridian. On said date the said C. W. Clarke and Philomen Clarke duly executed a deed of conveyance of the fee simple title in and to said tract of land to the United States of America, and on the 8th day of November 1899 the said deed was filed for record in the office of the Recorder of deeds for said county, and is recorded at page 165 of Book 232 of Deeds of the records of the said office.

III. That on January 13, 1900 the said C. W. Clarke filed in the United States Land Office at Independence, California, an application under the act of June 4, 1897 (c. 2, 30 Stat. 11, 36) to select in lieu of the aforesaid tract the following tracts in the public domain of the United States, to wit, lots one (1) and two (2) of the north west quarter (N. W. $\frac{1}{4}$) and lots one (1) and two (2) of the south west quarter (S. W. $\frac{1}{4}$) of section thirty (30) in township twenty eight (28) south, range twenty eight (28) east, of the Mount Diablo Meridian, in said State. Such application was accompanied with the deed of conveyance to the United States of America which is described in paragraph II hereof and an abstract of title to the land described in such deed, conformably with a requirement of those
3 Regulations of the Department of the Interior under the act of June 4, 1897, supra (reported in the 24th of the Land Decisions, 589, at 593), as follows, viz:

“16. Where the final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to execute a quit claim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the Government back again to the United States.”

IV. That the aforesaid application for an exchange of lands owned by the said Clarke for lands owned by the United States was amendatory of two previous similar applications under the said act of 1897 which the said Clarke filed on December 8, 1899, the two previous applications having been rejected by the General Land Office following a decision by it that title to the lands offered thereby to the United States in exchange for lots one (1) and two (2) of the north west quarter (N. W. $\frac{1}{4}$) and lots one (1) and

two (2) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty (30) in township twenty eight (28) south, range twenty eight (28) east of the Mount Diablo Meridian, was not shown to be vested in the said Clarke. The two previous applications were accompanied with affidavits alleging that the selected land (the land just described in this paragraph) was non-mineral in character.

V. Before the aforesaid amendatory application was tendered, a protest by individuals was made against the selection of said land by the said Clarke under the said act of 1897, the protest being based upon a charge that such land was mineral in character and valuable for mineral.

On January 30, 1901 the General Land Office held
4 that Clarke had a right to amend his two previous applications and recognized as an application duly amendatory thereof the application filed by him on January 13, 1900, but decided that his right to an exchange under the act of 1897 rested upon the amended application and not upon the original application. In so holding and deciding, the General Land Office also held and decided that the aforesaid protest rendered unsatisfactory and unacceptable the non-mineral affidavit which Clarke had executed and filed with and in support of his two original applications, and required that he file another and new affidavit alleging the non-mineral character of the selected land and thereby raise an issue of fact between himself and the protestants as to the character of such land.

VI. The said Clarke refused to execute and file such further affidavit and answered the requirement of the General Land Office therefor by contending that the affidavits filed with his two original applications were sufficient under the law and contained all the showing with respect to the character of the selected land which he was under any lawful duty or obligation to make. Thereupon the General Land Office rejected his aforesaid amended application. From the rejection the said Clarke appealed to the Secretary of the Interior who affirmed the action of the General Land Office. On April 16, 1902 the Secretary of the Interior denied a motion for rehearing and on April 28, 1902, in execution of the concurring decisions of the Secretary of the Interior and the General Land Office, the latter finally re-

5 jected Clarke's said amended application under the
said act of 1897 and the offer to exchange lands
made thereby, doing so for no other assigned reason
or ground than the said Clarke's refusal to furnish and
file such further or additional affidavit.

VII. Thereafter the said Clarke sought to have the General Land Office decide that he was entitled to a right of re-selection under the act of March 3, 1905 (c. 1495, 33 Stat. 1264) because, as he alleged, the rejection of his aforesaid amended application was not attributable to any fault of his. On October 3, 1919 the General Land Office decided that as "the selection (meaning the aforesaid amended selection) was rejected through the fault of the selector," there was no right of re-selection under said act of 1905.

VIII. That after the General Land Office and the Secretary of the Interior had thus rejected the amended application aforesaid and the General Land Office had thus decided that no right of re-selection thereunder existed by reason of the said act of 1905, this plaintiff, acting on the advice of counsel whom he regarded as competent to advise him in the premises and who did advise him that the aforesaid deed of conveyance by C. W. Clarke and Philomen Clarke to the United States of the east half of section thirty-six (36) in town ship ten (10) south, range twenty-seven (27) east, of the Mount Diablo Meridian in California, was legally inoperative and ineffective because the Land Department of the United States had refused to pass to Clarke any consideration whatever therefor, duly acquired, for a valuable consideration, all the interest, right, title
and estate of the said C. W. Clarke and Philomen
6 Clarke, both in law and equity, in and to the said
described half section of land, and is now the owner
of the same. That such advice by counsel to this plaintiff was that the Secretary of the Interior, in discussing the status of the title to lands reconveyed to the United States in support of a selection under the said act of 1897 which has been rejected or which had not been approved, had said:

"It (the selection) is a transaction of exchange and it is a necessary condition of title by exchange that there is 'a concurrent vestiture of title' to the things exchanged. The New Madrid Act (3 Stat. 211) provided for exchange of

private for public lands, and the court held in *Lessieur v. Price* (12 How. 59, 74) that such vestiture of title occurred when 'the United States assented to the exchange and not until then'.

* * * * *

"The transaction, of which the conditional delivery was a part, having wholly failed, the deed never became operative", * * *.

* * * * *

"The controlling principle is that when such proposed transaction fails, the proponent must, as far as possible, be restored to the status quo of the time when the transaction originated" (William E. Moses, decided November 25, 1904, 33 Land Decisions 333, at 334 and 335).

* * * * *

"No case is cited, and none have been found by the Department, where acceptance of a conveyance of title is presumed from mere filing of the conveyance for record by the grantor." (William E. Moses, decided February 24, 1906, 34 Land Decisions, 458 at 460.)

And such advice by counsel to this plaintiff also was that the Circuit Court of Appeals, Ninth Circuit, by decision rendered April 3, 1911, 187 Fed. 265, had affirmed a decree of the United States District Court for the District of Oregon, 174 Fed. 510, entered pursuant to an opinion of the latter court, apparently filed on November 28, 1909, in which opinion it was said:

7 "The mere execution and recording of a deed and the tender thereof vests no title in the government. Until the deed and title are examined and approved, it is a mere assertion by the applicant of his title and right to make the selection. *Cosmos v. Gray Eagle*, 190 U. S. 301; *C. W. Clarke*, 32 L. D. 233; *W. E. Moses*, 34 L. D. 460. But the equitable, if not the legal, title remains in him. The deed and tender thereof amounts to nothing more than an offer by the owner to exchange one tract of land for another, and the title does not pass to either party until the

exchange is effected. Until the deed is accepted, the owner of the land offered in exchange retains title thereto, either legal or equitable."

IX. That on February 11, 1921 the San Joaquin Light and Power Corporation, a corporation engaged in business in the State of California and having its principal place of business in the city of Fresno, in said State, applied to the Federal Power Commission for a reservation of the aforesaid east half (E. $\frac{1}{2}$) of section ten (10) in township ten (10) south, range twenty seven (27) east of the Mount Diablo Meridian, in California, "from entry, location or other disposal under the laws of the United States" in connection with a water power project then and now in contemplation by the said corporation. That such application was alleged to have been made pursuant to Section 24 of an act entitled "An Act To Create a Federal Power Commission", and for other purposes, approved June 10, 1920 (c. 285, 41 Stat. 1063) and was erroneously granted and allowed by the said Commission on or about March 11, 1922 when it issued a purported preliminary permit to said corporation under Section 5 of the said act. That on or about July 28, 1922 the said Commission issued to the said corporation a purported license under Section 6 of the said act to construct upon or otherwise use and occupy the aforesaid half section of land in connection with the said corporation's water power project.

X. That on or about April 1, 1924 this plaintiff requested the Commissioner of the General Land Office to formally disclaim on behalf of the United States all title, interest, right or claim of the United States in and to said half section of land. This the said Commissioner, by his letter of April 11, 1924 to this plaintiff, refused to do. Thereafter the Executive Secretary of the Federal Power Commission received a communication from the general counsel for the aforesaid corporation concerning the status of the title to said half section of land, which communication the Commission referred or transmitted to the office of the Secretary of the Interior where it was made the subject of a letter of October 31, 1924 from the Acting Secretary of the Interior to the Federal Power Commission (50 L. D. 660) wherein was considered the provisions of section 2 of

the act of September 22, 1922 (c. 404, 42 Stat. 1017) entitled "An Act for the relief of certain persons, their heirs or assigns, who heretofore relinquished lands inside national forests to the United States", the Acting Secretary saying:

"The Department is of opinion that the issuance of the license to the San Joaquin Light and Power Corporation constituted a disposition (by the United States) of the tract (the aforesaid half section of land) within the meaning of section 2 of the act of September 22, 1922 (42 Stat. 1017), and that the Secretary of the Interior is forbidden to quit-claim the tract to the party who conveyed it to the United States."

XI. That on or about September 4, 1925 plaintiff filed with the Federal Power Commission a petition by him to said Commission representing that its acts in issuing
9 a purported preliminary permit and a purported license to the San Joaquin Light and Power Corporation, as aforesaid, were illegal, non-jurisdictional, without authority of any law, contrary to all law, vested no legal right interest or claim whatever in said Corporation, beclouded the title in plaintiff to the aforesaid half section of land, and prayed that said Commission, after due notice to said Corporation and opportunity to it to show cause to the contrary, recall, vacate, rescind and hold for naught by appropriate action and notation on the records of the Commission the purported permit and purported license as aforesaid. That on February 25, 1926 the said Commission, by letter of its Executive Secretary to Patrick H. Loughran, attorney for plaintiff, a copy of which letter is annexed marked exhibit "A" to this bill and prayed to be made and considered a part thereof as though fully set out herein, denied plaintiff's said petition upon assigned grounds as follows, to wit:

First. That the title to the aforesaid half section of land was in the United States. Second "That the lands being lands of the United States and being included in the application (for permit to the said Corporation) *was* automatically reserved by section 24 of the Federal water power act." Third. "That the licensee (the said corporation) acquired rights under the license which the Federal Power Commission is without power to take away."

The said letter contains the statement that the Commission's denial of the said petition had been recommended and concurred in by each of the three defendants to this bill, to wit, the defendant Secretary of War, the defendant Secretary of the Interior and the defendant Secretary of Agriculture.

10 XII. And the plaintiff says that he was unwilling and refused, and that he notified the Federal Power Commission in the petition which he presented to it as aforesaid that he was unwilling and refused, to avail of the provision of the said act of September 22, 1922 that authorized a selection of public land of the United States in lieu of the hereinbefore described half section of land at any time within three years from the date of said act. Plaintiff was and is advised that it was not the intention or purpose of Congress by the said act of 1922 to require of him, or any other owner of the fee simple title to real property which had been illegally taken by officers of the United States under color of authority of their offices, to select in lieu of such property a parcel or parcels of the public domain or be deprived of such property and all remedy for the illegal taking thereof. And plaintiff was and is further advised that it was of the intention and purpose of Congress in and by the said act of 1922 to induce the extinguishment of any right of action for the unlawful taking or disposal by officers of the Government of the United States of lands in private ownership, by offering to the owners of such lands an opportunity, to be availed of at their option, of selecting in lieu thereof certain of the public lands of the United States, without impairment, however, of any right whatever of such owners as a consequence of their refusal to make such a selection.

XIII. And the plaintiff says that the act of September 22, 1922, supra, neither imparted validity to any non-jurisdictional act of the Federal Power Commission done and performed theretofore nor rendered legal any act by it done and performed theretofore under color only of
11 its authority. And plaintiff says that the said act did not impose upon said Commission a legislative mandate to abstain and refrain from revoking and cancelling on its records any purported permit or purported license which had been issued by it in disregard of its

jurisdiction and functions and under only color of authority, nor abridge or enlarge any of the powers or duties of that Commission with respect to any permit or license theretofore issued or thereafter to be issued by it, nor confer any new powers or duties whatever on said Commission, nor even relate to its powers and duties. Plaintiff is advised that even if the said act were in truth intended to legalize the purported permit and the purported license which the said Commission had issued to the San Juaquin Light and Power Corporation, it would be invalid to the extent of any provision therein indicative of a purpose to effectuate such intendment, because of repugnancy to the guarantee of the Fifth (5th) Amendment of the Constitution of the United States against deprivation of property without due process and the taking of private property for public use, without just compensation.

XIV. And the plaintiff says that the San Juaquin Light and Power Corporation has not constructed upon or used or occupied any part of said half section of land. That, however, the said corporation has manifested an intention or purpose, which has the sanction, approval, encouragement and aid of each of the three defendants to this bill, to make use of all or a part of said land as the bed or bottom of a reservoir which, when constructed, shall be

known as the Wishon Storage Reservoir of said corporation's water power project. That such intention or purpose has never in manner been assented to by this plaintiff or by any of his predecessors in title. That the said corporation bases its claim of right to effectuate such intention and to accomplish such purpose exclusively upon the permit and license issued to it by the Federal Power Commission as aforesaid as an authorization to it by the United States of America to use, occupy and take the aforesaid half section of land as property found and determined by the Government of the United States of America to be in the ownership thereof.

XV. The Federal Power Commission is an agency of the Government of the United States which Congress has authorized to exercise certain administrative functions with respect to certain of the public lands. The said Commission's issuance of the permit and license aforesaid was an assertion by it that the aforesaid half section of land was

public land of the United States within the jurisdiction of said Commission and subject to administration by it as such. That, therefore, such permit and license cause the title in the plaintiff to such half section of land to be clouded, which results in injury and damage to him in that its value is thereby lessened and a sale of it by the plaintiff for its fair value is rendered improbable if not impossible, while the title thereto remains so clouded.

Plaintiff is advised that he is without an adequate remedy at law in the courts of the District of Columbia, and also that he is without such remedy in either the State courts of or the Federal courts in the State of California
13 for the reason that neither of said courts have jurisdiction over the defendants to this bill and that the processes of neither could be availed of to compel the defendants to perform the act or acts requisite to removal of that particular cloud upon the plaintiff's title with respect to which he here complains.

Plaintiff is further advised (a) that irrespective of the measure of relief either of such courts might be competent to afford him, a cloud would remain upon his title so long as the Federal Power Commission permitted its files and records to show the aforesaid purported permit and purported license to be unrevoked and un-recalled by it, and (b) that the San Joaquin Light and Power Corporation is not a necessary party to this bill for the reason that it prays for no relief whatever against said corporation but only for relief against acts of the Federal Power Commission performed under color of authority of law and without jurisdiction over the aforesaid half section of land and occasioning a cloud upon plaintiff's title thereto.

Wherefore, the premises considered, the plaintiff prays:

I. That the process of this court issue directed to the defendants, Dwight F. Davis, Secretary of War, Hubert Work, Secretary of the Interior, and William M. Jardine, Secretary of Agriculture, as members of the Federal Power Commission, requiring them, and each of them, to appear and make answer under the foregoing bill of complaint.

14 II. That this court decree that the purported permit and purported license to use and occupy the east half (E. $1\frac{1}{2}$) of section thirty-six (36), in township ten (10) south, range twenty seven (27) east, of the

Mount Diablo Meridian, in the State of California, which the Federal Power Commission has issued to the San Joaquin Light and Power Corporation, as shown in the foregoing bill of complaint, were issued without jurisdiction by said Commission over said land for any of the purposes of the Federal Power Act or any act amendatory thereof or supplemental thereto and without lawful or any authority in said Commission to issue the same, and constitute a cloud upon the title of the plaintiff in and to said half section of land which has been created by acts of officers of the Government of the United States performed under color of authority of their offices and that the duty and obligation of the defendants under the law is to revoke and vacate the same.

III. That by a mandatory injunction issuing out of this court to the defendants, and each of them, or by such other of its processes as to the court may seem appropriate to the purpose, the defendants be required and commanded to revoke and vacate the actions of the Federal Power Commission pursuant to which such purported permit and such purported license were issued and so to note upon, amend or alter all the records of the said Commission that relate to such actions as to cause those records to show such revocation and vacation.

IV. And that the plaintiff may have all such other and further relief as the nature of his cause may demand and require, and be agreeable to equity.

REMBRANDT H. PEALE,
(P. O. address:) 325 Judge Bld.,
Salt Lake City, Utah,
Plaintiff.

PATRICK H. LOUGHRAN,
Mills Bldg., Washington, D. C.,
Attorney for Plaintiff.

15 The defendants to this bill of complaint are:

1. Dwight F. Davis, Secretary of War.
2. Hubert Work, Secretary of the Interior.
3. William M. Jardine, Secretary of Agriculture, as members of and composing the Federal Power Commission.

STATE OF CALIFORNIA,

County of Los Angeles, ss:

Before me, the undersigned, a Notary Public in and for the County of Los Angeles, State of California personally appeared Rembrandt H. Peale who, being by me first duly sworn, on oath, says: That he is the plaintiff named in the above and foregoing bill of complaint; that he has read the same and is acquainted with the contents thereof, and that the several matters and things therein set forth as on personal knowledge are true and those alleged therein on information and belief he verily believes to be true.

HEMBRANDT H. PEALE.

Subscribed and sworn to before me this 24th day of April, 1926.

[NOTARIAL SEAL.] ESTHER HATTENBACH,
Notary Public.

My Commission expires Jan. 5, 1927.

16 Federal Power Commission, Washington.

Secretary of War, Chairman; Secretary of the Interior;
Secretary of Agriculture; O. C. Merrill, Executive Secretary.

Address reply to Executive Secretary and refer to L,
Opinions, formal, Relinquishment of power site lands.

February 25, 1926.

Mr. Patrick H. Loughran,
Attorney-at-law,
Mills Building,
Washington, D. C.

DEAR SIR:

Reference is made to your petition of September 5, 1925, and supplemental letter dated December 28, 1925, in the matter of the application of R. H. Peale that the Federal Power Commission revoke and hold for naught its action on the application of the San Joaquin Light & Power Corporation, whereby the lands described in said petition,

along with other lands, were reserved for power purposes and included in the license issued to that company under date of July 28, 1922.

I have to advise you that the Commission at its meeting of January 28, 1926, approved the opinion of the Chief Counsel to the effect that the Commission cannot legally take the action requested in the petition. The following is an extraction of so much of the records of said meeting as bear upon the petition:

“The Executive Secretary presented an opinion of the Chief Counsel, dated October 6, 1925, arising out of the application of R. H. Peale of Salt Lake City, Utah, that the Federal Power Commission revoke and hold for naught its action on the application of the San Joaquin Light & Power Corporation, whereby the E. 1/2, Section 36, T. 10 S., R. 27 E., M. D. M., California, was reserved for power purposes and included in the license issued to that company July 28, 1922 (Project No. 175). These lands with other lands were relinquished by C. W. Clarke and wife, under whom Mr. Peale claims title, as bases for lieu selection under the Act of June 4, 1897 (30 Stat., 36), and were listed as lands of the United States included in the application of said corporation for license from the Commission. They will be covered in part by what is known as the “Wishon storage reservoir” of that project.

17 The Chief Counsel holds that upon the examination, approval and acceptance of the deed of relinquishment the United States acquired title to the lands relinquished, the grantor agreeing to make a lieu selection of lands open to selection under the Act of June 4, 1897; that the lands being lands of the United States and being included in the application were automatically reserved by Section 24 of the Federal water power act; that as held by the Acting Secretary of the Interior, October 3, 1924 (50 L. D., 660), the inclusion of these lands in the license was a disposition thereof within the meaning of Section 2 of the Act of September 22, 1922 (42 Stat., 1017), so as to preclude the relinquishment of title thereto under that Act; and that the licensee acquired rights under the license which the Federal Power Commission is without power to take away, it being expressly provided in Section

6 of the Federal water power act that licenses may be altered 'only upon mutual agreement between the licensee and the Commission.' The Executive Secretary stated that the opinion had received the preliminary approval of the three departments, and recommended its approval by the Commission. The Commission thereupon voted to approve the opinion as a decision of the Commission."

Very truly yours,

O. C. MERRILL,
Executive Secretary.

Motion by Defendants to Dismiss the Bill of Complaint.

Filed May 19, 1926.

* * * * *

Now come the defendants and move to dismiss the bill of complaint on the following grounds:

1. The bill does not join essential parties defendant.

(a) The allegations of the bill show that the San Joaquin Light and Power Corporation has prima facie an interest in the lands claimed by plaintiff, and that it has a right to be heard before any proceedings are taken to annul the instrument by which its interest was acquired. The license which is the subject of attack in plaintiff's bill of complaint is the instrument by which the United
18 States conveyed its interest in those lands to the said corporation. Any decree which might be entered by this court in anywise affecting the said license would necessarily affect and impair the interest which appears to have been conveyed thereby. It does not appear that the United States or these defendants claim any other interest or that a decree valuable for any purpose could be entered if reserving the rights of the said absent corporation.

(b) It is clear that the deed alleged by the bill of complaint to have been made November 4, 1899 was made to the United States, and that only duly-authorized agents of the United States could reconvey the land to the plaintiff. If there are defenses which might be asserted by the United

States maintaining its title to the said lands, the United States should be given an opportunity to present them. The United States is, therefore, a necessary party and the action should not proceed without it.

(c) The defendants are sued separately, though as members of the Federal Power Commission. The Federal Power Commission is a corporate entity organized by Congress to carry out Governmental purposes of the United States. The said Commission acts as a corporate body, and not by the individual acts of its members. Its acts cannot be directed by the court except by some writ which should operate directly upon the Commission and not indirectly through its members. The Federal Power Commission is not made a party.

19 2. The bill of complaint appears to be designed to quiet title to certain lands in the State of California, and the jurisdiction of the courts in regard thereto is fixed by the locus of the lands. The controversy is therefore not within the jurisdiction of this court.

3. The bill of complaint does not set forth any cause of action against the defendants or any of them.

(a) It appears from the bill of complaint that the defendants are without power to grant the relief prayed for. The authority of the Commission given under the act of June 10, 1920 (41 Stat., 1063) was to issue licenses to persons or corporations proposing the development of hydro-electric power upon public lands and waters of the United States. It was given no authority to try any suit to ascertain the title to any lands. The licenses which it might grant are in law a quitclaim of the interest of the United States in lands appearing to be owned by the United States with such reservations as are expressed in the said act of Congress. Under the said statute a license is issued subject to all rights of others. Irrespective of the rights plaintiff may show in the land in controversy, defendants can act only in the manner directed by Congress. Claims against the United States, whether for lands or moneys, can be prosecuted only in the forum and under procedure prescribed by Congress. It appears from the bill of complaint that public records show the title to the lands in question to be vested in the United States. No authority

has been given to the Commission and none is alleged
191½ in the bill of complaint to deal with such lands otherwise than by granting permits and licenses as provided in the Federal water power act.

(b) From the bill of complaint it appears that C. W. Clarke, who is alleged to have relinquished the said lands to the United States, had ample time and opportunity to perfect the exchange he sought, and that he was himself in fault for any failure to complete said transaction. It further appears from the bill of complaint that by act of Congress of September 22, 1922 (42 Stat., 1017) Congress again gave to the claimant of said lands an opportunity on fair and reasonable terms to make a selection in lieu thereof. It appears from the bill of complaint that plaintiff neglected and refused to avail himself of the privileges offered by said act. If plaintiff shall suffer any loss in respect of said lands the bill of complaint shows that it results from his own default and from his own failure to act within the reasonable limitations of time imposed by Congress.

(c) It appears from the bill of complaint that whatever cloud exists upon the title of plaintiff in said lands was created by the acts of himself or his predecessors, and was not the fault of the defendants or of the United States or of any one acting on behalf of the United States or the Federal Power Commission. The license referred to in the bill of complaint adds nothing to the cloud which was already upon his title, and the decree asked of this court would afford no relief from that cloud.

20 (d) If the authority of the Federal Power Commission is of the nature assumed by the plaintiff the action requested requires the exercise of discretion on the part of said Commission to determine that the facts are as alleged and that the law is what the plaintiff assumes it to be. In the first instance, the courts would be without authority to direct the Commission as to the manner in which its duty should be performed. To issue the mandamus prayed for would return the case to the Federal Power Commission leaving the matter again to be acted upon to the extent of its power by discretionary findings of law and fact. The court would again be without power to direct the action which the Commission must take.

(e) The license alleged to have been granted by the Federal Power Commission is under the law of such character as to be irrevocable except by consent of the licensee or by a court of competent jurisdiction for failure of the licensee to perform its conditions. It is no more recallable than would be a patent of the United States for the same lands. The action asked of this court is to direct the cancellation of the said license in so far as it may affect the lands in controversy. Private parties are without right and without standing in court to demand cancellation of such muniments of title issued by the United States.

(f) Plaintiff has mistaken his remedy. If he has a cause of action it may be prosecuted against the San Joaquin Light and Power Corporation in the State courts or
21 courts of the United States in the State of California, and the presence of the United States, if it in fact has no interest, or of these defendants, if their acts are void, is unnecessary to the determination of his rights or to a decree holding the said license to be void as to the said lands. Plaintiff does not allege in his bill of complaint that, as a matter of fact, his remedy in California is not complete. He alleges only that he is so advised. This is not a sufficient allegation to deprive the court of California of their jurisdiction over the title to the said lands.

(g) Plaintiff has an adequate remedy at law.

(h) The bill of complaint is without equity.

Wherefore the defendants pray that the bill of complaint be dismissed and that the defendants be not required to plead further.

B. M. PARMENTER,
Assistant Attorney General.

IRA E. ROBINSON,
Special Assistant to the Attorney General.

Notice.

* * * * *

To Patrick H. Laughran, Esq.,
Attorney for the Plaintiff,
Mills Building,
Washington, D. C.:

You will please take notice of the attached copy of
22 motion on behalf of the defendants to dismiss the
bill, and that the motion aforesaid will be set down
for hearing on Friday morning, May 28, 1926, 10 o'clock.

B. M. PARMENTER,
Assistant to the Attorney General;
IRA E. ROBINSON,
Special Assistant to the Attorney General,
For the Defendants.

Service acknowledged this 19th day of May, 1926.

PATRICK H. LOUGHRAN,
By ADELAIDE SPRECKELMYER,
Secretary.

Amendment of Original Bill.

Filed May 28, 1926.

* * * * *

Comes now Rembrandt H. Peale, the plaintiff, by his attorney of record, and by leave of court first had and obtained hereby amends his original bill herein as follows, to wit:

A. By adding a new party defendant thereto, to wit—

The Federal Power Commission, a governmental agency created and established by the Act of Congress of June 10, 1920, c. 285, 41 Stat. 1063, and composed of the other defendants to the original bill, to wit, Dwight F. Davis, Secretary of War, Hubert Work, Secretary of the Interior, and William M. Jardine, Secretary of Agriculture.

B. By causing that statement which precedes the first of the numbered paragraphs of the original bill to read as follows, to wit:

23 Rembrandt H. Peale, plaintiff, brings this his bill of complaint, on his own behalf and in his own right, against Dwight F. Davis, Hubert Work, and William M. Jardine, all citizens of the United States and residing in the District of Columbia, and the Federal Power Commission, a governmental agency created and established by the Act of Congress of June 10, 1920, c. 285, 41 Stat. 1063, in respect of the matters and things hereinafter set forth. The plaintiff says:

C. By adding to Paragraph I of the original bill, after the concluding words thereof, to wit, "and are sued as the members of such Commission", the following allegation:

That at the time of filing of this bill the Federal Power Commission was a governmental agency created and established by the Act of Congress of June 10, 1920, c. 285, 41 Stat. 1063.

D. By striking from the concluding sentence of Paragraph XI of the original bill the words therein, to wit, "by each of the three defendants", and substituting therefor the words, viz., by the defendant Dwight F. Davis, the defendant Hubert Work, and the defendant William M. Jardine.

E. By striking from the second sentence of Paragraph XIV of the original bill the words therein, to wit "of each of the three defendants to this bill", and substituting therefor the words, viz., of the defendant Dwight F. Davis, the defendant Hubert Work, and the defendant William M. Jardine.

F. By inserting in the second sub-paragraph of Paragraph XV of the original bill, after the opening words thereof, to wit, "Plaintiff is advised", the additional words, viz., and therefore avers.

G. By inserting in the third sub-paragraph of Paragraph XV of the original bill, after the opening words
24 thereof, to wit, "Plaintiff is further advised", the additional words, viz., and therefore avers.

H. By adding to the first of the prayers of the original bill, after the words therein, to wit, "as members of the

Federal Power Commission," the following words, viz., to The Federal Power Commission.

I. By inserting in the second of the prayers of the original bill, after the words therein, to wit, "which had been created by," the following words, viz., unlawful acts of the Federal Power Commission and.

J. By adding to the statement of the names of the defendants to the bill the following, to wit., 4. The Federal Power Commission.

REMBRANDT H. PEALE,
By PATRICK H. LOUGHRAN,
His Attorney.

DISTRICT OF COLUMBIA, ss:

Patrick H. Loughran, being first duly sworn, deposes and says that he is the attorney for Rembrandt H. Peale, the plaintiff in the proceeding entitled as above; that affiant has been authorized by the said Peale to amend the latter's original bill in said cause and that in pursuance of such authorization he has proposed the above and foregoing amendments thereto and requests that the court permit and allow the original bill to be amended accordingly.

PATRICK H. LOUGHRAN.

25 Subscribed and sworn to before me this 28th day
of May, 1926.

FRANK E. CUNNINGHAM,
Clerk,
By FRED C. O'CONNELL,
Asst. Clerk.
Fiat.

Leave to file the within amendment of the original bill is hereby granted this 28th day of May, 1926, on consent

WALTER I. McCOY,
Justice.

Memorandum Opinion.

Filed July 24, 1926.

* * * * *

This is a motion to dismiss a bill which prays that the defendants be directed to revoke a license issued by the Federal Power Commission to use certain land within the

limits of a forest reservation and to note such revocation on the records of the Commission on the ground that the license so recorded is a cloud on plaintiff's title.

One ground of the motion is that the United States has an interest and is entitled to be heard but has not consented to be sued.

The United States claims title to the land in question and to say the least as to that there is doubt whether its claim is not well founded. Under these circumstances the United States is entitled to be heard. *Louisiana vs. Garfield*. 211 U. S. 70.

26 The case made by the bill calls for a consideration of a provision of the Act of June 4, 1897, 30 Stat. 36, which reads:

"That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement and not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

and of regulations of the Department of the Interior section 16 of which reads as follows (24 L. D. 589, 593):

"16. Where final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to execute a quit-claim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for."

This regulation has been upheld as reasonable. *Cosmos Co. vs. Gray Eagle Co.*, 190 U. S. 201. *Roughton vs. Knight*, 219 U. S. 537.

One Clarke, the plaintiff's predecessor in title, filed an application for an exchange of the land in question which was in a forest reservation and recorded a deed to the United States as provided in the Regulation and at the same time made a lieu selection as provided by the Regulations. This application was amendatory of two previous similar applications filed by Clarke which were rejected because titles to the base lands offered in exchange
27 were not shown to be vested in him. The lieu land selected by those previous applications was the same as that selected by the application here being considered. The amended application was rejected because of an unsatisfactory affidavit as to the non-mineral character of the lieu land selected Clarke refusing to file another affidavit and not seeking to make another selection.

The Act of 1897 was repealed by the Act of 1905, 33 Stat. 1264, with a proviso reading:

“Provided, That selections heretofore made in lieu of land relinquished to the United States may be perfected and patents issue therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.”

On October 3, 1919, a request was made of the General Land Office by Clarke for a decision that he was entitled to make a reselection under the Act of 1905 claiming that the former rejection of his application was through no fault of his. He was held to be in fault and the decision went against him in October, 1919.

In that state of the matter plaintiff acquired Clarke's title to the land in question. Thereafter the Federal Power Commission under the statute which created it, 41 Stat. 1063, in July 1922 issued a license to a power company to use the land. By the Act of September 22, 1922, 42 Stat. 1017, relief of persons situated as plaintiff was provided for. Under it he might have applied within three

years after the date of the Act for land in lieu of the land here in question. He did not do so.

28 It is obvious that on the facts stated "The United States fairly might argue" (Louisiana vs. Garfield, supra, at page 77) that it has title to the land in question.

It may fairly be contended that there was an implied recognition that Clarke had title to the land which he offered as a base in that the application for an exchange was rejected on a ground relating solely to the selected land and therefore that the deed from him had been accepted. If the title to the base land had not been determined to be good that would undoubtedly have been the ground stated for the rejection of the application as in the instances of the two previous applications mentioned above. In other words the officials of the Land Office would undoubtedly determine whether the title which was offered was good and then determine whether the land selected might be given in exchange.

The United States might argue also that for equitable relief it would be necessary at least to allege that Clarke had possession and that the plaintiff took and has held possession under the deed from Clarke. "The United States might and undoubtedly would deny the fact of such possession and that fact cannot be tried behind its back," Louisiana vs. Garfield, supra, and it might also be argued that the plaintiff has only an equitable title if any.

The motion to dismiss the bill is granted with costs to the defendants.

Settled order on written consent or on two days' notice in writing.

WALTER I. McCOY,
Chief Justice.

29 *Final Decree Dismissing Bill.*

Filed July 30, 1926.

* * * * *

This cause came on to be heard on the motion of the defendants to dismiss the bill of complaint and was argued by counsel;

Whereupon the Court being fully advised in the premises, and on consideration thereof, it is this 30th day of July, 1926,

Ordered, that the motion to dismiss be and the same is hereby sustained on the ground assigned therein, to wit, that the United States is a necessary and indispensable party to the proceeding, has not been made a party thereto, and not having consented to be sued could not be made a party thereto;

And the plaintiff elected to stand upon said bill of complaint, as amended, it is upon the said day last above written.

Further ordered, adjudged, and decreed that the bill of complaint, as amended, be, and the same hereby is, dismissed and that the defendants have judgment against the plaintiff, as at law, for their reasonable costs to be taxed by the Clerk of the Court.

By the Court:

WALTER I. McCOY,
Chief Justice.

And from the foregoing decree, on the day last above written the plaintiff in open court prays an appeal to the
30 Court of Appeals of the District of Columbia, and the same is hereby allowed; the penal sum of bond for costs on appeal being fixed at \$100 with leave to plaintiff to deposit in lieu thereof the sum of \$50 with the Clerk of the Court.

By the Court:

WALTER I. McCOY,
Chief Justice.

No objection as to form.

PATRICK H. LOUGHRAN,
Attorney for the Plaintiff.

Memorandum.

August 5, 1926.—\$50 deposited in lieu of appeal bond.

Assignments of Error.

Filed August 12, 1926.

* * * * *

Rembrandt H. Peale, plaintiff and appellant, assigns the following error in the opinion and decree of the Supreme Court of the District of Columbia in the above entitled cause:

I. Error in failing to decide that the acts of The Federal Power Commission in issuing a permit and license to the San Joaquin Light and Power Corporation embracing the land described in the bill *clearly* were *not* acts either required or authorized with respect to such land by any law of the United States *obviously* were *not* acts evincive of effectuation of an intention of Congress that the said Commission should assume and exercise jurisdiction over such land for any of the purposes for which the Commission had been created, but *indubitably* were acts done and performed by the Commission in excess of its lawful power, in misuse and abuse of its actual authority, in violation of the limitations upon its jurisdiction, and under color of office, with the effect of so clouding the title to land in the ownership of the plaintiff as to cause it to appear, contrary to the fact, that the United States was invested with the title thereto.

II. Error in deciding that the ratio decidendi in *Louisiana v. Garfield*, 211 U. S. 70, ruled the suit instituted by appellant.

III. Error in failing, apparently, to perceive the full signification of the ruling in *Louisiana v. Garfield*, *supra*, to wit:

* * * "that if the United States *clearly* had no title to the land in controversy we should have jurisdiction to entertain the suit." (Emphasis supplied.)

IV. Error in failing, apparently, to perceive that what was meant by the Court in *Louisiana v. Garfield*, supra, was this:

That where the soundness of the contention that the full legal and equitable title is vested in the plaintiff is entirely evident either from a set of facts whose effect in law has an established meaning that is wholly consistent with the contention, or from a matter of law the intent of which has become finally settled, and wholly supports the con-
32 tention, the courts will take jurisdiction of the suit and either restrain an officer of the United States from taking an action that would cast a cloud upon title or command the officer to revoke an action that has already clouded title.

V. Error in failing, apparently, to perceive the full signification of the statement in *Louisiana v. Garfield*, supra, to wit:

“The *doubt* is whether Louisiana has not now a good title by the lapse of five years since the approval and by the operation of that act. But that *doubt* cannot be resolved in this case.” (Emphasis supplied.)

VI. Error in failing, apparently, to perceive that what was meant by the Court in *Louisiana v. Garfield*, supra, was this:

That where in any suit of the character of *Louisiana v. Garfield*, supra, the court is *not* in “doubt” as to the soundness of those contentions of the plaintiff on which he must rely exclusively, but is of opinion that such contentions are manifestly valid because completely consistent either with previous authoritative and final expositions of applicable law or with the obvious and unmistakable intent and purpose of applicable statutes whose sense is so patent that there is no room for the exercise of judicial judgment and discretion as to their meaning or scope, the suit should not be dismissed on a motion alleging that the United States is a necessary party.

VII. Error in being in “*doubt*” as to whether “on the facts stated ‘The United States fairly might argue’
33 (Louisiana v. Garfield, supra, p. 77) that it has title to the land in question.” (Emphasis supplied.)

VIII. Error in failing to decide that *there was no "doubt"* by reason of the facts stated in the bill that *the United States could not "fairly" argue* that it has title to the land in suit.

IX. Error in being in "*doubt*" as to whether it was essential to the equitable relief prayed for in the bill that it be alleged therein "that Clarke had possession and that the plaintiff took and held possession under the deed from Clarke."

X. Error in failing to decide that *there was no "doubt"* that it was non-essential to the equitable relief prayed for in the bill that it be alleged therein that Clarke, and the appellant as Clarke's successor in title, had been and were, respectively, in actual occupancy, in physical possession of the land.

XI. Error in failing to decide that *there was no "doubt"* that the appellant's allegation in his bill of ownership of the land by him rendered non-essential to the sufficiency of the bill an allegation therein that he was also in actual occupancy or physical possession of the land.

XII. Error in concluding that as "it might also be argued (by the United States) that the plaintiff has only an equitable title if any," therefore the appellant's bill must be dismissed.

XIII. Error in failing to decide that *there was no "doubt"* that the appellant had the full legal and equitable title to the land.

34 XIV. Error in failing, apparently, to perceive that what would warrant dismissal of a suit of the character of the one instituted by the appellant on the ground that it was essentially a suit against the United States, is not what the United States, if duly a party, *might* argue in defense against the suit, but what matters of law and fact pertinent to and material in the suit engender in the judicial mind a *real* "doubt" as to whether title is in the plaintiff or in the United States.

XV. The lower court having made an express finding that:

* * * "The amended application (by C. W. Clarke to select under the Act of June 4, 1897, 30 Stat. 36) was rejected because of an unsatisfactory affidavit as to the non-

mineral character of the lieu land selected, Clarke refusing to file another affidavit and not seeking to make another selection,”

it was error not to have decided that there was no real “doubt” that rejection of the Clarke application manifestly caused a mutual discontinuance and abandonment of all negotiations for an exchange of lands between Clarke and the United States and undoubtedly was a definite and final refusal to accept the deed of conveyance to the United States which Clarke had tendered.

XVI. Error in failing to decide on the authority of the numerous departmental and court decisions, including decisions of the Supreme Court of the United States, cited by counsel for appellant in his argument at the bar of the lower court and in papers presented to that court for its consideration while the merits of plaintiff’s bill was under advisement by it, that there was no real “doubt” that it is long settled law—finally settled by such decisions—, and

35 that it is clearly and unmistakably the meaning of the act of June 4, 1897, that the rejection of an application for an exchange of lands under that act is a refusal of acceptance of the tender of the deed of conveyance made by the applicant and that such rejection and consequent refusal leave the United States without even a color of claim to the land described in such deed.

XVII. Error in dismissing appellant’s bill on the assigned ground that the United States is a necessary party thereto.

XVIII. Error in dismissing appellant’s suit on the assigned ground that it is essentially a suit against the United States.

XIX. Error in dismissing the appellant’s bill on any of the grounds assigned in the motion to dismiss.

XX. Error in refusing to grant all the prayers of appellant’s bill.

REMBRANDT H. PEALE,

Appellant,

By PATRICK H. LOUGHRAN,

Attorney for the Appellant.

Service of copy of the foregoing assignments of error acknowledged this 11th day of August, 1926.

IRA E. ROBINSON,
Attorney for the Appellees.

36 *Designation for Preparation of Record.*

Filed August 12, 1926.

* * * * * * *

To the Clerk Supreme Court of the District of Columbia:

The plaintiff having perfected an appeal herein to the Court of Appeals of the District of Columbia on August 5, 1926, hereby requests the Clerk of the Supreme Court of the District of Columbia to prepare, at plaintiff's expense, a transcript of the record on appeal, including therein the following papers and proceedings, namely;

1. Plaintiff's bill of complaint and all the exhibits thereto.
2. The amendment of plaintiff's bill with the court's fiat endorsed thereon.
3. Defendants' motion to dismiss.
4. Chief Justice McCoy's memorandum of opinion.
5. The Court's decree dismissing the bill, and the note of appeal and the order for security for costs which are appended to said decree.
6. Clerk's note of making of deposit of \$50 as security for costs.
7. Assignments of error.
8. Copy of this designation.

PATRICK H. LOUGHRAN,
Attorney for Rembrant H. Peale,
Plaintiff and Appellant.

Service of copy of the foregoing designation for preparation of record is acknowledged this 11th day of August, 1926.

IRA E. ROBINSON,
Attorney for Defendants and Appellees.

37 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
* *District of Columbia, ss:*

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 36, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 45607 in Equity, wherein Rembrandt H. Peale is Plaintiff and Dwight F. Davis, Secretary of War, et al. &c. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of October, 1926.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 4519. Rembrandt H. Peale, appellant, vs. Dwight F. Davis, Secretary of War, et al. Court of Appeals, District of Columbia. Filed Oct. 29, 1926. Henry W. Hodges, clerk.

(3535)

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

JAN 4 - 1927

Henry M. Hodges

Court of Appeals of the District of Columbia.

October Term, 1926

No. 4519

REMBRANDT H. PEALE, *Appellant*,

v.

DWIGHT F. DAVIS, Secretary of War;
HUBERT WORK, Secretary of the Interior;
WILLIAM M. JARDINE, Secretary of Agriculture;
As members of and composing the Federal
Power Commission; and
THE FEDERAL POWER COMMISSION.

*Appeal from the Supreme Court of the District of
Columbia.*

BRIEF FOR APPELLANT.

PATRICK H. LOUGHRAN,
Attorney for the Appellant.

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Court of Appeals of the District of Columbia.

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No. 4519

REMBRANDT H. PEALE, *Appellant*,

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HUBERT WORK, Secretary of the Interior;
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As members of and composing the Federal
Power Commission; and
THE FEDERAL POWER COMMISSION.

*Appeal from the Supreme Court of the District of
Columbia.*

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Supreme Court of the District of Columbia dismissing a bill for a mandatory injunction to each of the three members of The Federal Power Commission, and to the said Commission, commanding that there be revoked and vacated those acts done by, and in the name of the said Commission, whereby the E 1½ of Section 36, Tp. 10 S., R. 27 E., M. D. M., California, was included (a) in a certain preliminary permit which the said Com-

mission issued to the San Juan Light and Power Corporation, on or about March 11, 1922, under Section 5 of the act of June 10, 1920 (c. 285, 41 Stat. 1063), commonly known as the Federal Power Commission Act, and (2d) in a certain license which the said Commission issued to the said corporation, on or about July 28, 1922, under Section 6 of the said act. (The Bill, R. 2 to 12.)

The decree of dismissal was rested upon one of many grounds assigned in a motion to dismiss, to-wit, the ground that the suit, in effect, was a suit against the United States. (The motion to dismiss, R. 15 to 18; the lower court's opinion, R. 21 to 24; its decree, R. 24 to 25.)

The admitted facts in the litigation, admitted for the purposes of the motion to dismiss, are shown by the bill to be these: That on November 4, 1899, one C. W. Clarke and Philomen Clarke, his wife, were the owners in fee simple of the aforesaid half section; that on said date they executed, and on November 8, 1899, they recorded a deed of conveyance of their fee simple title to the half section, to the United States, and on January 13, 1900, applied at the United States Land Office, at Independence, California, to exchange the half section for land situated in Section 30, Tp. 28 S., R. 28 E., M. D. M., California, under the Act of June 4, 1897 (c. 2, 30 Stat. 11, 36); that on April 28, 1902, the General Land Office finally and authoritatively rejected such application for exchange; that on October 3, 1919, the said office finally and authoritatively rejected an application by the said Clarke for recognition as one entitled to propose another exchange with the United States, under the Act of March 3, 1905 (c. 1495, 33 Stat. 1264); that thereafter the appellant became vested, by purchase from the said C. W. Clarke and

Philomen Clarke, with all of whatever legal and equitable title to the half section remained in the said Clarkes after such rejection and such refusal, and was the owner thereof at time of filing of the bill; that on March 11, 1922, and July 28, 1922, the Federal Power Commission issued the permit and license, respectively, aforesaid; that on April 11, 1924, the General Land Office denied an application by the appellant for disclaimer of interest in the half section; that on October 21, 1924, the Acting Secretary of the Interior decided that because of the aforesaid permit and license and the provisions of the act of September 22, 1922 (c. 404, 42 Stat. 1017), "the Secretary of the Interior is forbidden to quit claim the tract to the party who conveyed it to the United States"; that on February 25, 1926, the Federal Power Commission, in acting on a petition to it that the permit and license be revoked and cancelled as to the aforesaid half section of land, denied such petition and decided that the half section was the property of the United States, and that the aforesaid permittee and licensee "acquired rights under the license which the Federal Power Commission is without power to take away." (R. 13 to 15.)

The bill alleges that the Federal Power Commission never had any jurisdiction, authority, or power whatever over said half section; that it was land in private ownership at the time of issuance of the permit and license aforesaid; that continually since April 28, 1902, when the Clarke application for an exchange of lands was finally and authoritatively rejected, the United States was without any interest whatever in said land; that, however, under color of office, and with the effect of clouding the appellant's title, the said individual defendants, acting in the name of the Federal Power Commission, had assumed to administer said land as public land of the United States.

The prayers of the bill, in substance, and to the extent material in connection with the argument, are these:

A. "That this court decree that the purported permit and purported license" * * * "were issued without jurisdiction by said Commission over said land" * * * "and without lawful or any authority in said Commission to issue the same, *and constitute a cloud upon the title of the plaintiff.*" (Emphasis ours.)

B. "That a mandatory injunction" issue to each of the individual defendants, and to the Federal Power Commission, commanding that they and it vacate and revoke the permit and license, to the extent that it includes the half section of land.

The motion to dismiss the bill asserts:

1st. That the Commission's permittee and licensee is a necessary party.

2d. That the United States is a necessary party.

3d. That the bill is a suit to quiet title and, therefore, the court is without jurisdiction.

4th. That the power of the appellees to revoke or cancel a permit or license is defined or limited by law, and the definition or limitation does not admit of revocation or cancellation for the reasons and upon the process that had been assigned and proposed, respectively, to the appellees by the appellant.

5th. That as appellant had refused to avail of the opportunity afforded to him by the act of September 22, 1922 (c. 404, 42 Stat. 1017), to select other land in lieu of the half section, therefore he is without standing in a court of equity.

6th. That the decree appellant seeks would be ineffective to remove the cloud upon his title.

7th. That in issuing the permit and license, the Commission exercised a discretion which it was authorized by law to exercise; and that for the judiciary to grant the prayer of the bill would be an attempt by it to exercise a judicial power it did not possess, to wit, to direct and control the discretion of the Commission with respect to a matter within its exclusive jurisdiction.

8th. That the appellant has another and adequate remedy, namely, a suit against the Commission's permittee or licensee "in the State courts or courts of the United States in the State of California."

9th. That appellant "has an adequate remedy at law."

10th. That "the bill of complaint is without equity."

The lower court, concluding that *Louisiana v. Garfield*, 211 U. S. 70, was an analogous case and that it ruled the case presented by the appellant, dismissed the bill. (R. 21 to 25.)

ASSIGNED ERROR UPON WHICH APPELLANT RELIES.

The assignment specifies twenty errors. All of them, however, can be stated in seven propositions, to wit:

A. That the lower court erred in deciding that a bill that sought a determination as to whether the authority or power of the appellees extended to a specific tract of land in California, was a bill for a decree of the Supreme Court of the District of Columbia quieting title to real property situated 3200 miles beyond the jurisdiction of that court.

B. That the lower court erred in failing to perceive that its duty under appellant's bill and the motion to

dismiss it, was not to determine a question of law, but was to find whether it was a matter of fact that the settled law was as contended for by the appellant, to wit, that upon the final and authoritative rejection of an application for an exchange of lands under the act of 1897, *supra*, the United States lost all of whatever interest it ever had in the land tendered to it under such application.

C. That the lower court erred in not finding the fact to be that it is long settled law—settled beyond the possibility of even a reasonable doubt—that after the final and authoritative rejection of an offer to exchange land in private ownership for land in the ownership of the United States, under the act of 1897, *supra*, the United States is without the slightest degree of interest of any character whatever in the land which had thus been tendered to it and which it had thus refused to accept.

D. That the lower court erred in its interpretation of the opinion in *Louisiana v. Garfield*, *supra*, in that it gave no effect whatever to the facts referred to in that opinion as the fact controlling it, to-wit: That while it had become settled law by reason of the decision in *United States v. Chandler-Dunbar Water Power Company*, 209 U. S. 447, that a void patent was validated by the Act of March 3, 1891, c. 61, Sec. 8, 26 Stat. 1099, it was still an unsettled question whether a void approval of land to a State, as swamp land, was also validated by the said statute.

E. That the lower court erred in its interpretation of the opinion in *Louisiana v. Garfield*, *supra*, in that it gave no effect whatever to the following statement therein. to-wit:

“We will assume *for purposes of decision* that if the United States *clearly had no title* to the land in controversy we should have jurisdiction to entertain this suit.” (Emphasis ours.)

F. That the lower court erred in failing to perceive that the opinion in *Louisiana v. Garfield, supra*, was an enunciation of the doctrine that where, in a suit against a government officer, a contention is made by the officer's counsel that the United States has an interest and, therefore, is a necessary party, *but the contention is clearly contrary to settled law*, the suit is in no sense or in any way a suit against the United States.

G. That the lower court erred in deciding that there was reason to doubt, i. e., that it was questionable whether it was settled law—that after the final and authoritative rejection of a tender or offer of an exchange of lands under the act of 1897, the United States is without any interest whatever in the land which had been conveyed to it in earnest of the good faith of such tender or offer.

ARGUMENT.

I. The Mistake of the Court Below in Regarding the Suit as One for a Decree Quieting Title.

There is not now, and there never was, a question of law in this case. This is so because the bill is founded upon a proposition of manifest fact, to-wit, the fact that the law upon which the appellant relies is settled—is clear—is unmistakable—is unquestionable—is free from doubt—is as certain as is the existence of government under the Federal Constitution. Upon this

theory the suit was brought. Upon this theory the appellant rests.

It was not contended below by the appellees—their admission of the truth of the allegations of the bill having precluded the contention—that Clarke was not the owner, in fee simple, of the half section at time of execution of his deed of conveyance to the United States. But it was contended below by the appellees, and, of necessity, they will so contend here, that the final rejection of Clark's original application to select land in lieu of the half section, and the refusal thereafter to recognize him as one entitled to re-apply to so select, did not have the effect in law of a non-acceptance or rejection of the deed of conveyance to the United States.

A more plainly unmoral contention than that—a contention more clearly unsound in law because of administrative and judicial decisions exposing its fallacy and condemning its inherent iniquity—can not, we believe, be discovered in the record of any suit ever filed against an officer or any governmental agency of the United States. In its essence such contention is this: That title, in fee simple, became vested and is now vested in the United States by virtue of such deed and its recordation, notwithstanding that no consideration whatever therefor has ever passed from the United States to Clarke, or to any one.

Nor was it contended below by the appellees—and, of course, could not have been contended, owing to the admission of the truth of the allegations of the bill—that the appellant had not acquired all of whatever legal and equitable estate and title in and to the half section remained in Clarke and his wife after final and authoritative rejection of the application to select and final and authoritative refusal of recognition in Clarke of a right to re-apply to select. However, the appellees

took the position below and, of necessity, will take the position here, that the deed of conveyance by Clarke to the United States, although the latter has never given any consideration whatever therefor to Clarke, or to any one, effectually extinguished all the legal and equitable estate that Clarke ever had in or to the half section and, therefore, the appellant acquired nothing whatever under the deed of conveyance to him which was subsequently executed by Clarke and his wife. Such position, of course, is an inevitable corollary of the contention of the appellees which we have hereinbefore characterized as being both manifestly unsound in the light of settled law and inherently iniquitous.

However, owing to the admission of the truth of the allegations of the bill, it can not be doubted that the appellant, the grantee of Clarke and his wife, is in court with the same right and standing therein that Clarke and his wife would have if they had not conveyed to this appellant, or to another, and had instituted such a suit against the appellees as the instant one. Allusion to this evident fact would not be made here if we did not anticipate hearing in this court the same contention from the appellees as was made on their behalf orally in the court below, viz. that the bill does not show sufficiently, if at all, that the appellant is the grantee of Clarke and his wife; a contention which has no relation to any of the numerous grounds assigned in support of the motion to dismiss.

The following facts are convincing that the lower court regarded the suit as a proceeding for a decree to quiet title:

1. The nature of the queries of that court to counsel in the progress of the argument;
2. The nature of that court's opinion; and

3. The fact that *Louisiana v. Garfield*, 211 U. S. 70, which was a suit to quiet title, was cited by the lower court as authority for its decision.

At time of drafting and filing of our bill, it was our understanding of equity jurisprudence that the venue of a suit to quiet title to real property was the venue of the property. We did not, therefore, institute the suit with a conscious intention of having a court in the District of Columbia assume jurisdiction to quiet title to real property in the State of California. We drafted and filed the bill upon the theory that the Supreme Court of the District of Columbia had jurisdiction over government officers officially and personally resident within that District, and possessed enough of judicial power to afford relief to a citizen from acts of those officers done in excess of their jurisdiction, authority, or power. But it now seems that such theory was not apparent to the lower court from anything set out in our bill, for that court did not dismiss the bill upon the ground that we were mistaken as to the scope of its jurisdiction over government officers, or as to the range of its judicial powers, but upon the ground that we had sought to have it determine the title to real estate located 3200 miles beyond the territorial limits of its jurisdiction.

In the lower court's opinion in this case (R. 21 to 24) appears this statement:

"The United States claims title to the land in question, and to say the least as to that *there is doubt* whether its claim is not well founded."

The unsettled matter of law which gave rise to such "doubt" is not indicated at any place in the lower court's opinion. But in *Louisiana v. Garfield*, *supra*, the Supreme Court of the United States explicitly

stated the matter of law which was unsettled and which gave rise to that court's doubt as to the soundness of Louisiana's claim of ownership to the land there in suit. Elsewhere in the lower court's opinion (R. 4) there is this statement:

"It is obvious that *on the facts stated* 'the United States fairly might argue' (*Louisiana v. Garfield*, *supra*, at p. 77) that it has title to the land in question." (Emphasis ours.)

None of "the facts stated" would suffice to remove or except the Clarke selection of lieu lands from the class of similar selections with reference to which both the Interior Department and the courts have repeatedly held, that upon the final and authoritative rejection of forest lieu selections, the United States ceases to have any interest whatever in the base lands of the selections and the selectors cease to have any interest whatever in the selected lands. The appellant is in the dark, and so is this appellate court, as to what "facts stated" the lower court was of opinion gave rise to a question of law, with reference to forest lieu selections, which had not been long settled by departmental and court decisions.

The circumstance that renders it entirely clear that the court below erroneously regarded appellant's bill as a bill for a decree quieting title, is the appearance in the lower court's opinion of this observation, to wit:

"The United States might argue also that for equitable relief it would be necessary at least to allege that Clarke had possession, and that the plaintiff took and has held possession under the deed from Clarke."

The matter of possession is, indeed, of controlling importance in any suit in a federal court that seeks a de-

cree of the court quieting title. But this is not such suit. As stated before, it is a suit to determine whether it is the settled law that the United States has no interest whatever in the base land described in a forest lieu selection after a final and authoritative rejection of the selection. And if such be the settled law, it follows therefrom that the acts of the appellees in issuing the permit and license were acts *ultra vires* and, therefore, invalid and without any effect whatever upon title to land in the State of California, or elsewhere.

But, of course, it would have been necessary to a decision by the lower court sustaining the bill and granting the prayers thereof, that it conclude that it was shown by the bill that title to the half section was vested in the appellant. This it would necessarily have done, if it had applied to this case the rule of decision unmistakably enunciated in *Louisiana v. Garfield*, *supra*, substantially to this effect, to wit:

“That where the soundness of the contention that the full legal and equitable title is vested in the plaintiff is entirely evident either from a state of fact whose effect in law has an established meaning that is wholly consistent with the contention, or from a matter of law the intent of which has become finally settled, and wholly supports the contention, the courts will take jurisdiction of the suit and either restrain an officer of the United States from taking action that has cast a cloud upon title, or command the officer to revoke an action that has already clouded title.” (Fourth assignment of error, R. 27.)

Stated otherwise, the doctrine of *Louisiana v. Garfield*, *supra*, is manifestly this:

“That where the court is not in doubt as to the soundness of those contentions of the plaintiff on

which he must rely exclusively, but is of opinion that such contentions are manifestly valid because completely consistent either with previous authoritative and final expositions of applicable law, or with the obvious and unmistakable intent and purpose of applicable statutes whose sense is so patent that there is no room for the exercise of judicial judgment and discretion as to their meaning or scope, the suit should not be dismissed on a motion alleging that the United States is a necessary party thereto." (Sixth assignment of error, R. 27.)

After the Federal Power Commission rejected the appellant's petition to it for revocation and cancellation of the permit and license, the appellant knew that any suit by him against the Commission would be met by a contention that the suit was one against the United States. Appellant did not expect the officers of the Federal Power Commission to admit, when sued, that their conduct had been contrary to settled law and, therefore, was *ultra vires*. Appellant fully expected those officers to do precisely what they have done, namely, seek to cause the court to refuse to relieve the appellant from the Commission's blunder in administering a citizen's land as public land of the United States, by pleading that their blunder had caused the United States to acquire an interest in the land which rendered it a necessary party to the suit. Such blunders in the administration of the affairs of government in its executive department are usually attempted to be covered up and sheltered against an exercise of the power that is vested in the judicial department of the government, by just that sort of a pleading by the blunderers.

But this is not the sort of a case in which it is easy for officers in the executive department of the gov-

ernment to prevent the judicial department thereof from exercising its power in defense and vindication of the rights of citizens under the law of the land, that have been either condemned by the arbitrary acts of executive officers or prejudiced through oversight and inadvertence on their part. In other words, the instant suit is not an attempt to have the judiciary interfere with the discretion of officers exercised with respect to a subject-matter within their jurisdiction, but is a challenge of the authority of the officers to perform the acts complained against by the appellant. A suit so directed—directed against abuse of power—must be determined on its merits, i. e., must be decided by the court in accordance with its judgment as to whether there was authority of law for the acts complained against. *Philadelphia Company v. Stimson*, 223 U. S. 613, 619.

That the jurisdiction, authority, or power of the Federal Power Commission in the matter of permits and licenses are expressly and specifically limited and restricted to public lands of the United States, is a proposition that is uncontested in this case. All that is contested therein is the appellant's other proposition, to wit, that it is within the competence of the equity court of the District of Columbia to determine whether the Commission has acted *ultra vires* in issuing a permit and license for a particular piece of land situated outside the District of Columbia, without assuming to have the power to make a decree quieting title to the particular piece of land. We say "without assuming to have the power to make a decree quieting title to the particular piece of land," because we are convinced that no decree of any court in the District of Columbia purporting to quiet title to land outside that District would have any more efficacy in

law than a similar decree of any other court without jurisdiction over the land.

But does it follow that because the District of Columbia judiciary is impotent to make a decree quieting title to real property outside the District, that it also is impotent to protect a citizen against the acts of government officers in Washington performed *ultra vires*, when the acts affect prejudicially the real property of the citizen situated elsewhere than in the District? We would not propound that question in an argument before this court, if the lower court's opinion did not cause it to be pertinent. A study of that opinion will disclose that it rests upon this theory: That every act of an officer in the executive branch of the government in Washington is, presumably, an act on behalf of and in the interest of the United States, and is, also presumably, performed in the exercise of an authority or power in the officer derived from the United States, and therefore, that the validity of any such act, if it relates to real property, is not judicially determinable in a suit to which the officer only is the defendant, but is determinable not otherwise than in a proceeding to quiet title, to which both the officer and the United States are necessary parties defendant.

The lower court's theory and our theory are antipodal. We think that all that is required to cause the Supreme Court of the District of Columbia to determine whether a government officer in Washington has acted *ultra vires*, is that the validity of the officer's act be challenged in the equity division of that court by filing a bill that exhibits an interest which the law of the land protects and which is prejudicially affected by the officer's act, if the act be contrary to the law of the land, and hence invalid.

What interest did this appellant show that is prejudicially affected by the acts of the appellees, if their acts are contrary to the law of the land, and hence invalid? He showed, and the motion to dismiss admitted the showing to be true, that in him was vested all of whatever interest Clarke and his wife had in the half section after rejection of the Clarke application for an exchange of lands, on April 28, 1902. The lower court concluded that the appellant sought from it a decree determining the character and extent of such interest and quieting title thereto in the appellant, if adjudged to be vested in him. *But the appellant sought nothing of that sort from the lower court.*

What the appellant in fact did in alleging that he had acquired such interest from Clarke and his wife, was merely to exhibit the interest he had in bringing and maintaining the suit. He alleged the acquisition of all the interest of Clarke and his wife, in order to show that he had such an interest as entitled him to sue. If without an interest which would be unlawfully prejudiced and damaged, if the acts of the appellees against which he complained were *ultra vires*, he would be without a right to complain in court concerning those acts. And merely to describe or specify how the prejudice and damage to the interest was occasioned, or caused, if the acts of the appellees were *ultra vires*, he alleged that the acts of the appellees constituted a cloud on title. The words in the bill, "cloud on title," are, we think, measurably responsible for the erroneous supposition of the court below that our suit was one to quiet title to land in California under and by a decree of a court in the District of Columbia.

The second paragraph of appellant's bill (R. 11 and 12) also, we think, might have contributed to the lower

court's erroneous supposition that the bill was one for a decree quieting title. Therein it is prayed:

"That this court decree that the purported permit and purported license" * * * "were issued without jurisdiction by said Commission over said land" * * * "and without lawful or any authority in said Commission to issue the same, *and constituted a cloud upon the title of the plaintiff.*"

Obviously that is not a prayer for a decree quieting title. Nor is there a prayer for such a decree anywhere in the appellant's bill. The foregoing quoted matter as it appears in the bill, merely states what of necessity must be the conclusion and decree of the court if the settled law as to the effect of a final rejection of an offer to exchange lands under the act of 1897, is what the bill represents it to be (R. 5, 6 and 7), to wit, that "the title does not pass to either party until the exchange is effected." And if that is the settled law, the injury inflicted upon the appellant by the conduct of the appellees in issuing the permit and license was just what the appellant had stated it to be and asked the court to decree it to be, viz, that such conduct "constituted a cloud upon the title of the plaintiff." Unless the court should find that some injury had resulted to the appellant, it could not decree at all, and to decree as prayed by the plaintiff would be only to show in the decree the character of the injury sustained by the appellant that gave him a standing in court and warranted an exercise of judicial power on his behalf.

The "cloud on title" does not exist in California. It exists only in the District of Columbia. Nothing of record in the office of any custodian of land records in the State of California produces an actual cloud on appellant's title. The fact that the deed by Clarke

and his wife is of record in that State is not, *per se*, an actual cloud. The California banks, title companies, bar, bench, and people know well, and conform their dealings to, the settled law to the effect that the final and authoritative rejection of an application to select under the act of 1897 is operative to leave the United States without any title, estate, interest, or claim whatsoever under the deed that was tendered to it in support of such application. It was because of the settled law to that effect, that the appellant purchased from Clarke and his wife. And it is because of the settled law to that effect that the appellant could not at any time, even if he had desired, maintain an action for cancellation of the deed to him from Clarke and his wife and for recovery from them of the consideration given for such deed. But notwithstanding that settled law, the appellees, *twenty years after final and authoritative rejection of the Clarke application for an exchange of lands, and undoubtedly through oversight and inadvertence*, assumed to exercise jurisdiction, authority, or power over the half section, as land that had become a part of the public domain of the United States by virtue of nothing more than a deed to the United States, for which the consideration requested by the grantor had been refused and denied.

Such unlawful assumption of jurisdiction, authority, or power, *undoubtedly through oversight and in advertence*, constitutes a cloud upon appellant's title *in the District of Columbia and not in California*, and is a more serious injury to appellant now than ever before. We say a more serious injury now than ever before, because the court below has virtually declared that there is no settled law to the effect that upon the rejection of a forest lieu land selection the United States is without any interest whatever in the base land tendered in sup-

port of such selection. The lower court said that there was reason for doubt as to whether that was the settled law. And it further said that it was powerless to resolve the doubt, because the United States was not a party to the suit. And that utterance of the lower court—a court with power to afford a remedy for acts of officers of the government in the District of Columbia contrary to settled law—occasions great anxiety, not only in the appellant but others in the Western States. Thereby the lower court arrayed itself against all the courts in the Western States, as well as against the Department of the Interior, on a matter of law. If the Court of Appeals of the District of Columbia should express the same doubt, it also would be arrayed against all such courts and said Department, and the effect would be to render all persons who considered themselves owners of lands in the Western States, which had been tendered to the United States under the Act of 1897, and rejected, exceedingly anxious because of the possibility that their lands also might be included in a permit or license to convert them into the bed or bottom of a reservoir, under authority of the United States.

If the Supreme Court of the District of Columbia is indeed impotent to adjudge, in a proceeding by the appellant to which the United States is not a party, whether the appellees acted *ultra vires* in issuing the permit and license, to what other court can the appellant resort for a determination of that question? It is alleged in the bill that the permittee and licensee—

“has not constructed upon or used or occupied any part of said half section of land. That, however, the said corporation has manifested an intention or purpose, which has the sanction, approval, encouragement and aid of each of the three defendants to this bill, to make use of all or a part of

said land as the bed or bottom of a reservoir which, when constructed, shall be known as the Wishon Storage Reservoir of said corporation's water power project." (R. 10.)

If the San Joaquin Company was in occupancy, a suit against it for possession would undoubtedly be maintainable upon the authority of *United States v. Lee*, 106 U. S. 196; *Stanley v. Schwably*, 147 Ibid. 508, and *Tindall v. Wesley*, 167 Ibid. 204. The fact that in the cases cited the defendants were officers of the government would not render the principles of those cases inapplicable to a suit for possession against a permittee and licensee of the government. The claimed authority for the possession of the permittee and licensee would be the same claim of authority which the officers made, viz, authority under the United States. But the permittee and licensee is not in possession, and hence the appellant has no ground upon which to rest a suit for possession.

Nor is the appellant in possession otherwise than as "the law deems every man to be in the seisin and possession of land to which he has a perfect and complete title." (*United States v. Arredondo*, 6 Pet. 691, 743.) "The allegation that the plaintiff is seized in fee simple is a sufficient allegation that he has the possession as well as the title." * * * "The allegation that he has no adequate remedy at law is dispensed with by Equity Rule 21." (*Gauge v. Kaufman*, 133 U. S. 471.) See also *District of Columbia v. Hufty*, 13 App. D. C. 175.

The fact that the San Joaquin Co. has exhibited a purpose to submerge the half section, is doubtless sufficient to justify the filing of a suit in a California court for an injunction against the company. But no

court in California, in any conceivable form of suit by the appellant, could render a judgment or decree, or issue any process, that would be effective to bring about cancellation of what appears upon the records of the Federal Power Commission. So, even if an injunction against submergence were obtained, there would still persist that injury to the appellant which is its present injury, viz, the record in the office of the Federal Power Commission of an act of that Commission in assertion of jurisdiction, authority and power over the half section as a part of the public domain of the United States.

The appellant's bill (par. VIII thereof, R. 5, 6 and 7) cited certain decisions of the Department of the Interior, of the United States District and Circuit Courts of Appeals, and of the Supreme Court of the United States, and averred that in those decisions the settled law as to the effect of a final and authoritative rejection of a forest lieu selection was stated. *The issue under the bill and the motion to dismiss it was essentially one of fact, to wit, was the settled law what the appellant's bill represented it to be.* By erroneously concluding that the bill sought a determination of controverted points of law and a decree quieting title, the lower court imputed to the appellant and his counsel the egregious blunder inhering in an attempt to have the Supreme Court of the District of Columbia enter a decree purporting to quiet title to land in California.

II. The Settled Law upon which the Appellant's Suit was Rested and is being Prosecuted.

The syllabus of the opinion in *Maybury et al v. Hazeltine*, 32 L. D. 41, reads, in part, as follows:

“Where the owner of lands within a forest reserve makes reconveyance of the same to the United States, with a view to selecting other lands in lieu thereof under the exchange provisions of the act of June 4, 1897, no act should be done or permitted by the government looking toward the disposal of said land until the title tendered has been examined, found satisfactory, definitely accepted, and noted on the records of the local office.”

In *C. W. Clark*, 32 L. D. 233 at 235, it was said:

“The Supreme Court held in *Cosmos Oil Company v. Gray Eagle Oil Company* (190 U. S. 301), that the record of a deed purporting to convey lands to the United States and its tender to the land department under the exchange provisions of the act of June 4, 1897, was a mere assertion by the applicant of his title and of right to make selection, and that no equitable title vested until the title was examined and approved. *It is a necessary deduction from this decision that all equitable right of property in the land relinquished remains in the proponent until the title is examined, approved, and accepted by the land department.*” (Emphasis ours.)

In *Lafayette Lewis* (33 L. D. 43 at 44) it was said:

“Lands conveyed to the United States under this act do not become public lands subject to entry *until the title tendered has been accepted and approved*, it is due the proponent, as good faith on the part of the United States to whom he tenders title, that *no act should be done or permitted by the government which can impair or cloud his right until the title he tenders is found satisfactory and is accepted.* *Maybury et al v. Hazeltine* (32 L. D. 41, 42). *This is so clearly the requirement of good faith on part of the United States*

that argument on that head is unnecessary." (Emphasis ours.)

The first paragraph of the syllabus of the opinion in *George Austin* (33 L. D. 589) is as follows:

"A deed of relinquishment, executed under the exchange provisions of the act of June 4, 1897, for land within a forest reserve, *does not operate to vest title in the United States until the title tendered has been examined and accepted*; and, until such time, no action should be taken or permitted by the government looking to the disposal of the relinquished land, or which would in any wise impair or cloud the relinquisher's right or claim of title." (Emphasis ours.)

In *William E. Moses*, decided November 25, 1904 (33 L. D., 333, at 334, 335), it is said:

"Equitable title to land relinquished to the United States under the exchange provisions of the act of June 4, 1897, does not vest until examination and acceptance of the title by an authorized officer of the United States. In *Cosmos Exploration Company v. Gray Eagle Oil Company* (190 U. S. 301, 312), the court held that:

"There must be a decision made somewhere regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land can exist. The mere filing of papers can not create such title. The application must comply with and conform to the statute, and the selector can not decide the question for himself. * * * (313). It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it."

"It is a transaction of exchange and it is a necessary condition of title by exchange that there

is 'a concurrent vestiture of title' to the things exchanged. The New Madrid Act (3 Stat. 211) provided for exchange of private for public lands, and the court held in *Lessieur v. Price* (12 How. 59, 74) that such vestiture of title occurred when 'the United States assented to the exchange and not until then.'

"The deed having been delivered to officers of the United States for their inspection and acceptance and being found not acceptable, *the United States has no claim to the land nor right to possession of the deed. The transaction, of which the conditional delivery was a part, having wholly failed, the deed never became operative, and the grantor is entitled to its return that the grantee may be divested of the presumptive evidence of ownership. Devlin on Deeds, Sec. 271; Graves v. Dudley* (20 N. Y. 77); *Ford v. James* (2 Abb. N. Y. App. 159); *Freeland v. Charnley* (80 Ind. 132)."

* * * * *

"The controlling principle is that when such proposed transaction fails, the proponent must, as far as possible, be restored to the status quo of the time when the transaction originated." (Emphasis ours.)

In *W. E. Moses Land Scrip & Realty Co.*, decided February 24, 1906 (34 L. D. 458 at 460), it is said:

"An exchange is essentially a single contract. The rights in the things exchanged mutually vest at the same point of time. *Lessieur v. Price* (12 How. 59, 74). While the regulations under the act of June 4, 1897, require the private owner of such lands to record his deed and to prepare and file an abstract and deed at the time he makes his selection, *it can not be held that good equitable right to the land relinquished passes to the United States by record of the deed, for some officer of the United States must examine the title, pass upon its sufficiency, and accept it. Cosmos Company v. Gray Eagle Company* (190 U. S. 301, 312). It is a

general principle in the law of real estate that title does not pass until the deed is delivered to the grantee. Though acceptance of a title conveyed is, under some circumstances, presumed from its being beneficial to the grantee, it will be seen from examination of such cases that there was a lapse of time with an entry into possession by the grantee, or other evidence of circumstances raising a presumption of the grantee's acceptance of the conveyance. *No case is cited, and none has been found by the Department, where acceptance of a conveyance of title is presumed from mere filing of the conveyance for record by the grantor. If the grantee is bound to render an equivalent or consideration for the conveyance, it is manifest that to hold the grantee obligated to pay a consideration where he has not received the conveyance is unsound in principle as creating a contract which the grantee never actually considered or determined to enter into.*" (Emphasis ours).

In *Fred A. Kribs*, decided September 8, 1908 (37 L. D. 142, at 143), the Interior Department referred to a deed to the United States by a person whose selection under the act of 1897 of lands in lieu of those described in the deed had been rejected, and said:

"The possession of these papers by the United States is in principle no different from the possession of a deed and abstract of title delivered in proposed exchange under the act of June 4, 1897 (30 Stat., 36). The papers are not a record or property of the United States evidencing a transaction of disposal of public lands. *The United States has parted with or given nothing upon faith of them. The vendor in a transaction of sale or exchange obviously can not hold both that which was to be received and what was to be given as its equivalent—the thing and the price.* He must convey, or on failure of the transaction he must return what he

has received. William E. Moses (33 L. D., 333). He has no claim to both merely because at failure of the negotiation he had possession of both." (Emphasis ours.)

The Interior Department's conclusions in *William E. Moses, supra*, were referred to approvingly in *Clearwater Timber Company v. Shoshone Co.*, Idaho, (153 Fed. 612).

In *United States v. McClure*, decided November 28, 1909 (174 Fed. 510, at 511 and 512) the United States Circuit Court for the District of Oregon said:

"But the title does not pass to the land offered in exchange until the deed is accepted. The mere execution and recording of a deed and the tender thereof vests no title in the government. Until the deed and title are examined and approved, it is a mere assertion by the applicant of his title and right to make the selection. *Cosmos v. Gray Eagle* (190 U. S., 301); *C. W. Clarke*, 32 L. D., 233; *W. E. Moses*, 34 L. D. 460. But the equitable, if not the legal, title remains in him. The deed and tender thereof amounts to nothing more than an offer by the owner to exchange one tract of land for another, and the title does not pass to either party until the exchange is effected. Until the deed is accepted, the owner of the land offered in exchange retains title thereto, either legal or equitable." * * *

For affirmance of the United States Circuit Court's decree in *United States v. McClure*, see 187 Fed. 265. The writer's inquiries have failed to show that the case went to the Supreme Court of the United States.

In *Boughton v. Knight*, decided February 20, 1911 (219 U. S., 537), Boughton had executed and recorded a deed to the United States before enactment of the

repeal statute of March 3, 1905, c. 1495, 33 Stat. 1264, but had not applied to make a selection until eleven days after that date. The Interior Department rejected the selection. Boughton's contention was that by the execution and recordation of his deed he had accepted the offer made by the Act of 1897 to exchange lands of the United States for his lands and that his acceptance of the offer was a contract which the repealing statute did not affect. But the Supreme Court of the United States found that his deed had never been accepted, and decided that "there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency *and an assent to the particular selection made in lieu*" (emphasis ours), before any contractual right or interest in any one accrued by reason of the conveyance to the United States.

In *Sawyer v. Gray*, decided April 10, 1913 (205 Fed. 160 at 168) the District Court for the Western District of Washington, after discussing many court and departmental decisions, relating to exchanges under the Act of 1897, said:

"In the forest reserve, the individual retains the title until the exchange with the government is completed."

III. The Sheer Nonsense of a Contention that the Act of September 22, 1922, c. 404, 42 Stat. 1017, Caused the United States to Acquire an Interest in the Half Section Under Notice in this Case.

After the bill which became the Act of September 22, 1922, *supra*, was introduced, the First Assistant Secretary of the Interior reported thereon to the Chairman of the Public Lands Committee of the House, by letter of May 26, 1921, as follows:

"In this connection it should be also stated that as held by both the courts and this department, *no interest vested* in applicants for lieu selections by virtue of their applications, or *in the government under their deeds*, until the applications had been examined and approved. This holding was based on the ground that until so examined and approved the deeds had been merely tendered, but there had been no such delivery or acceptance as would pass any title whatever. (See *Cosmos Company v. Gray Eagle*, 190 U. S. 301, 312; 32 Land Decisions, 233; and 33 Land Decisions, 501.) However, as stated, there is no law under which the representatives of the government are authorized to remove this apparent cloud by the execution of a proper instrument." (Emphasis ours.)

* * * * *

"It will be observed that this is not a matter of reconveyance, but the conferring of authority to relinquish and quit claim in order to remove *an apparent cloud* cast upon their titles by applicants who sought to exchange under the provisions of the said act of June 4, 1897, in accordance with the rule adopted for its administration." (Emphasis ours.) (P. 6514, Congressional Record, Vol. 61, Part 6, 67th Congress, 1st Session.)

The same officer of the government who wrote to Representative Sinnott the letter from which the above matter is quoted, also approved the Instructions of February 13, 1925 (51 L. D. 51), in which the act of 1922 is discussed and its meaning more or less accurately expounded. In such Instructions, that officer causelessly impeached the honesty of Congress and displayed but feeble powers of judgment, for in the Instructions appears this statement, to wit:

"The act last above quoted is clearly based on the theory that the deeds of reconveyance recorded prior

to March 3, 1905, vested title in the United States, even though a selection based thereon had not been filed." (Emphasis ours.)

Every statute of Congress which the Supreme Court of the United States has decreed to be invalid was "based on the theory" that it was a constitutional exercise of legislative power. So even if it were true that the act of 1922 was "based on the theory that the deeds of reconveyance" vested title in the United States, notwithstanding that the deeds had been tendered upon condition and to effectuate an exchange which the United States had refused to consummate, the act would be quite as clearly unconstitutional as any other legislative fiat that a title vested in a citizen must be regarded by administrative officers of the United States as a title vested in the United States.

But it is outrageously libellous of Congress to impute to it any such "theory."

The absurdity of a bureaucratic fancy that can see in the act of 1922 a legislative command to the officers of government to treat such "deeds of reconveyance" as evidencing title in the United States is perfectly apparent. *Said act is a legislative admission that title is not in the United States, for, by its express terms, the Secretary of the Interior "is authorized to accept title."* (See section 1 of the act.) *Why authorize him "to accept title" for the United States if title is already vested in the United States?* Said act is a legislative admission that the land described in such "deeds of reconveyance" are not the property of the United States, for by its express terms, it authorizes negotiations for the acquisition of title to such land by the United States. *Why authorize negotiations for an exchange of timber, or lands, for the lands described in such "deeds of recon-*

veyance," if the title to the latter is already vested in the United States? The patent truth is that the act of 1922 was "based on the theory that the deeds of conveyance" were wholly ineffective to pass title to the United States.

The grade of reasoning denoted by the conclusion of the Department of the Interior that Congress intended by the act of 1922 to assert ownership by the United States of privately owned land for which the United States had never given any consideration whatever, should suffice to enlighten the judiciary as to the degree of legal acumen and mental perspicacity that are possessed by some administrative officers whose primal duty it is to discover the will and purpose of Congress and impartially give effect to both. It is inevitable that such will and such purpose will not be accurately perceived at all by persons who are likely to impute to Congress, without the slightest provocation, such stupidity as is imputed to it in the statement "that the act last above quoted is clearly based on the theory that the deeds of reconveyance" * * * "vested title in the United States."

The act of 1922, *supra*, affords relief, as follows: (a) To those owners whose property has not "been disposed of or appropriated to a public use," such owners having an option to consummate a "swap" on the terms the act offers, or to obtain a quit claim; (b) To those owners whose property has been disposed of or appropriated, but who, nevertheless, are able to obtain the consent of "the head of the department" to a quit claim, such owners having the same option as that accorded to the owner of the class first above described; (c) To those owners whose property has been disposed of or appropriated but who are unable to obtain the consent of "the head of the department to a quit claim," such

owners being without right to a quit claim but being allowed, if they desire, to consummate a "swap" on the terms the act offers.

The appellant is of the third class of owners and has refused the terms of "swap" offered by the act of 1922. And therefore, as the appellees say, his land is the property of the United States, because, forsooth, the act of 1922 was designed and intended by Congress to be a "legislative construction" of the forest lieu act of 1897 that would bind this and all other courts to decide, contrary to all judicial and quasi-judicial construction of the act of 1897 prior to the approval of the statute of 1922, that a citizen's land, offered to the United States in "swap" for United States lands, became the property of the United States, notwithstanding that the United States had flatly refused to accept the proffered "swap." Even if Congress had as assinine an intent as the defendants seem to insist that it entertain, the courts may be very confidently relied upon to frustrate any intent on the part of Congress to deprive citizens of the protection afforded them by the Fifth Amendment.

The act of 1922 did not deprive the appellant of any rights or remedies he had before that statute was enacted. That legislation neither abridged pre-existent rights nor limited or restricted pre-existent remedies. Therefore, and as the act is silent as to what may be done or shall be done by either the owner or the United States in a case where the owner's lands have been disposed of, and he refuses to accept the consideration therefor that the act renders available by him, it is an irresistible conclusion that such an owner has now all the rights and remedies consistent with the Fifth Amendment which he had before approval of the act of 1922. However, it should not be astonishing that so

plain a proposition is not discernible by the mind or minds that became convinced that said act was "clearly based on the theory that the deeds of reconveyance" * * * "vested title in the United States." However, it might be astonishing to one less experienced of departmental reasoning than the author of this brief.

The equity powers of a court to correct and remedy the effect of an act by a governmental body or officer under color of the authority of its or their office, are the same now as they were before approval of the act of 1922. That legislation did not strike down or diminish any of those powers of the courts. Nor did said act, nor could it, render lawful either a previous or a subsequent taking, disposal and appropriation of a citizen's property by a governmental body or officers without just or any compensation. But why argue further in the presence of any court of this rank in support of what we know to be obvious to it?

CONCLUSION.

As the Facts, Viewed in the Light of Settled Law, Demonstrate Beyond Reasonable Doubt that Title is in Private Ownership, it Follows that Neither the United States nor its Permittee and Licensee is a Necessary Party.

In the instant case, as in *Lane v. Watts*, 234 U. S. 525, *Work v. Louisiana*, 70 L. Ed. 87, and *Mason v. Work*, 55 App. D. C. 349, the matter brought to the notice of the judiciary instanced acts of officers *ultra vires*, i. e., acts for which there did not exist the command, or authority, of Congress. In *Lane v. Watts*, *supra*, as here, the facts, viewed in the light of the settled law, revealed an assumption of jurisdiction over land in private ownership. In *Work v. Louisiana*, *supra*, it was conceded that the legal title had not

passed from the United States, but it was decided that an act of the Secretary of the Interior in imposing a certain requirement upon Louisiana was an act for which there was no authority of law. In *Work v. Mason, supra*, as in the instant case and also in *Lane v. Watts, supra*, the injury was occasioned by the invasion of the rights or property of citizens by acts, or threatened acts, of government officers in Washington.

If none of the numerous actual occupants and land entrymen of the lands that were the subject of *Lane v. Watts, supra*, was a necessary party in that case, upon what conceivable theory can it be seriously urged that the San Joaquin Company is a necessary party to this case? If the writer's numerous clients—occupants and entrymen—of the lands involved in *Work v. Louisiana*, 70 L. Ed. 87, decided November 23, 1925, were not necessary parties in that case, what special or privileged status under the law has the San Joaquin Company that requires it to be held that it is a necessary party to the instant case? If none of the applicants for prospecting permits for the lands involved in *Work v. Mason, supra*, was a necessary party in that case, what considerations of justice require a decision that the San Juan Light & Power Corporation is a necessary party to appellant's bill? And as the United States was not a necessary party to any of the three cases just cited, what new dispensation since decisions in those cases renders it a necessary party here?

In *Work v. Mason, supra*, it was shown that the Secretary of the Interior had assumed to issue oil and gas permits for lands in private ownership. Of course this court sustained the bill to restrain such lawless conduct by that officer. We again refer to the case

only because, while the Secretary of the Interior appealed to the Supreme Court of the United States, the Solicitor General of the United States refused to prosecute the appeal in that court and caused it to be dismissed on March 1, 1926.

It is respectfully submitted that the decree of the lower court is erroneous and should be reversed.

Respectfully submitted,

PATRICK H. LOUGHRAN,
Attorney for the Appellant.

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**In the Court of Appeals of the District of
Columbia**

OCTOBER TERM, 1926

REMBRANDT H. PEALE, APPELLANT

v.

DWIGHT F. DAVIS, SECRETARY OF WAR; HUBERT
WORK, SECRETARY OF THE INTERIOR; WILLIAM M.
JARDINE, SECRETARY OF AGRICULTURE, AS MEMBERS
OF AND COMPOSING THE FEDERAL POWER COMMIS-
SION; AND THE FEDERAL POWER COMMISSION, AP-
PELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

BRIEF FOR APPELLEES

B. M. PARMENTER,
Assistant Attorney General.

IRA E. ROBINSON,
Special Assistant to the Attorney General.

J. F. LAWSON,
Attorney for Federal Power Commission.

In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1926

No. 4519

REMBRANDT H. PEALE, APPELLANT

v.

DWIGHT F. DAVIS, SECRETARY OF WAR; HUBERT Work, Secretary of the Interior; William M. Jardine, Secretary of Agriculture, as members of and composing the Federal Power Commission; and The Federal Power Commission, appellees.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA

BRIEF FOR APPELLEES

Without waiving any of the propositions of law on which the appellees moved to dismiss the bill, it is submitted that the lower court was right in the reason assigned for its action in sustaining that motion. Under the facts as stated in the bill it is clear that the appellant does not have the legal title which was referred to in *Louisiana v. Garfield* (211 U. S. 70) as being essential to maintenance of suit

against the agents of the United States without making the United States a party; and on the same statement of facts it is more than doubtful whether appellant has an equitable title.

The legal title was conveyed to the United States by the deed executed November 4, 1899, described in the bill of complaint (Record, page 3). It is not alleged anywhere in the bill that this deed was ever returned to the grantor or that the legal title conveyed thereby was ever in any manner reconveyed by the United States to him.

The regulations of the Land Office required that, upon rejection of an application for an exchange of two tracts of equal area, the deed be returned to the applicant (*Roughton v. Knight*, 219 U. S. 537). It is to be presumed that the officers of the Government performed the duties imposed upon them by law and regulation (*Martin v. Marks*, 7 Otto, 345; *Weirhauser v. Hoyt*, 219 U. S. 380). If they did not return the deed, therefore, there was a reason. This reason is exhibited in the regulations of the department governing the conduct of such transactions in cases where a deed was given to the United States for a large tract and the selections accompanying the same did not exhaust the right of selection (29 L. D. 578). Nothing in the bill of complaint negatives the idea that such was the situation in this case. *The United States has a right to set up the fact and has a right to be a party*

to the case in which it is tried. The regulations of the Land Department, which have the force of law (*Cosmos Exploration Company v. Gray Eagle Oil Company*, 190 U. S. 301), were issued March 5, 1900 (29 L. D. 578), and contained this warning:

In cases where relinquishments under said act have been accepted and selections in partial satisfaction thereof have been approved, the same will be allowed to stand, notwithstanding the selections do not exhaust the claims to lieu lands. But you will notify all such claimants that their failure heretofore or delay henceforward to select the balance of the area necessary to exhaust their claims under said act, will be at their own risk. Not only are the boundaries of forest reserves subject to change as pointed out in the decision in the case of Tevis, *supra*, but bills are now pending before Congress the purpose of which is to modify the conditions under which lieu selections based upon relinquishments of lands within such boundaries may be allowed. Additional selections of lands in satisfaction of relinquishments previously made will be subject to all changes occurring in the meantime both in the reservation boundaries and in the law governing the right to make selection of lieu lands.

* * * * *

In every instance the land selected must *at the time of selection* be of the character subject to selection.

**The Selection failed through fault of selector and of
Appellant**

These regulations constituted fair warning that all persons who had a right of selection must exercise the same promptly or risk defeat of their selections without the return of their deeds or titles. It appears from the bill that on April 28, 1902, the selection based upon the deed herein recited was finally rejected. By the Act of March 3, 1905, Congress repealed the lieu selection law (33 Stat. 1264), saving however to those having a right of selection the right to complete the same unless their original selection had been rejected for their fault. C. W. Clarke, who gave the deed here in question to the United States, had thus nearly three years within which to obtain the equivalent of the land he conveyed. According to the facts recited in the bill it was not until the year 1919 that Clarke sought, under the provisions of the repealing statute, to make a new selection. It was then held by the General Land Office that the said selection had been rejected through the fault of the selector and that there was no right of reselection. The bill shows (Record, page 4) that the selection failed because the selector refused to furnish an affidavit to the effect that the selected lands were nonmineral in character and subject to selection. This refusal is sufficient evidence of the fact that Clarke knew his selection to be of mineral lands not open to selection under the act of June 4, 1897 (30 Stat. 36). In *Cosmos Exploration Co. v. Gray Eagle Oil Com-*

pany (190 U. S. 201) and *United States ex rel. Riverside Oil Company v. Hitchcock* (190 U. S. 316), the Supreme Court held that the law was that mineral lands could not be so selected. In selecting lands to which he was not entitled, in connection with which he refused to file a nonmineral affidavit, the selector was clearly at fault, and the Land Office was right in so finding. These facts were sufficient to justify the finding of the lower court that the United States has an apparent interest in these proceedings and that it can not be divested thereof in any proceeding to which it is not a party.

**Appellant has not availed himself of the remedy offered
by Congress**

There were many instances in which the exchange under the lieu selection law was not completed after deeds were given to the United States. These deeds actually constituted, in the counties where they were recorded, a cloud upon the titles to many tracts of land which the Government had not intended to take over without giving the full equivalent. To remedy this situation Congress on September 22, 1922 (42 Stat. 1017), passed a statute authorizing a fair adjustment with the claimants to such lands. It was provided that, where the lands were not in reservation or had not been disposed of, the Secretary of the Interior might give a quitclaim deed releasing the land to the proper claimant. In cases where the land was in reservation, such deed might be given with the consent of

the head of the department having control of the reservation. A third case, however, was provided for, where the lands had been disposed of to others. In this case Congress expressly forbade the giving of a quitclaim deed and by implication forbade the heads of other departments having any reserved interest therein from assenting to such a conveyance. In the latter case there was offered to the claimant the right to make a new selection of lands of approximately equal value.

From the recitals in the bill of complaint it is clear that before the enactment of this statute the lands had been disposed of. (R. p. 7.) License to the San Joaquin Light & Power Corporation was given by the Federal Power Commission July 28, 1922. As to lands of the United States such a license under the terms of the Federal Water Power Act (41 Stat. 1063) vests in the licensee an interest as irrevocable as if passed by a patent. The Acting Secretary of the Interior, therefore, was right in the action alleged to have been taken by him (Record, page 7; 50 L. D. 660), when he held that "such license constituted a disposition of the tract within the meaning of Section 2 of the act of September 22, 1922, and that the Secretary of the Interior is forbidden to quitclaim the tract." The bill shows that the appellant, who had succeeded to the claim of C. W. Clarke, refused to avail himself of the provision authorizing a new selection (R., p. 90) but insisted upon the return

of the title which had been conveyed to the Government. Apparently conceding that a quitclaim deed could not be given to him, he on April 1, 1924, requested the Commissioner of the General Land Office to formally disclaim on behalf of the United States all "title, interest, right, or claim of the United States in and to said half section of land." The Commissioner refused. (R. p. 7.) It is clear that the action requested by appellant was not the action which the Commissioner of the General Land Office was authorized by law to take. Such a disclaimer would have been a mere opinion to the effect that there was no title in the United States, that the act of 1922 was unnecessary legislation, and that it was not applicable to any of the cases for which Congress had been trying by that act to provide.

Not content with the action of the Land Office the appellant attempted to get a similar opinion from the Federal Power Commission (R. p. 8) after the Commission had acted upon the application for license and had granted such license to the San Joaquin Light & Power Corporation. Such license was subject to the provisions of Section 6 of the Federal Water Power Act. This section declares that licenses may be revoked only for the reasons and in the manner prescribed by the act. For the Federal Power Commission to "recall, vacate, rescind and hold for naught" the purported license would essentially be a revocation of the license. The

action requested was, therefore, beyond the authority conferred upon the Federal Power Commission or upon the appellees herein. (*Lane v. Watts*, 234 U. S. 525.)

It is thus seen that appellant is now asking the court to require action which the Federal Power Commission is forbidden by law to take and is asking that the Secretary of the Interior, one of the respondents herein, be required to take action which is equivalent to that forbidden by the act of September 22, 1922, both to his department and to the Federal Power Commission, which has jurisdiction over the lands so devoted to power production.

Congress accepted the title given by Clarke's deed

Irrespective of what had been the opinion or practice of the Department of the Interior or of the courts as to when title in the base lands passed to the United States the act of Congress of 1922 was, at least as to lands which inadvertently or otherwise had been disposed of, an acceptance of such title and a renewal of the right of the selector to complete on a fair basis the original transaction in accordance with the original purpose. If the title had not been previously approved and accepted by the Land Office as a part of the original transaction or by the happening of the events forecast in the regulations which we have quoted, or by the ensuing disposal of the lands by the proper agency of the Government, it was by this act of Congress accepted by Congress itself. It was not thereafter

open to the lieu selector to withdraw the title, nor was it open to the executive officer of the Government to disapprove or reject the conveyance to the Government or to render an opinion that such conveyance was ineffective. By express words they were forbidden to quit claim the interest which had been conveyed to the United States.

By its title and by its wording the act of 1922 covers all cases where conveyances had been made to the United States and the selection not completed. The case of the plaintiff is within its terms. The act is not silent as to what shall be done with lands situated as these claimed by the appellant. Congress recognized that the equities of the transferees of the Government intervene. The equities which suggest to the appellant that the San Joaquin Light & Power Corporation be called before the Federal Power Commission (Record, page 8) indicate that the same company is entitled to its day in court and that its interests should not be determined in its absence. The license which was given to this corporation retains in the United States an interest in lands covered by it. This is the present interest of which the United States would be divested if the decree of the court, as prayed for, could have the effect intended by the appellant.

Title of appellant was lost by default

The act of 1922 gave to persons, situated as appellant is, a period of two years in which to make selections for land that could not be reconveyed to

them. During this period appellant neglected and refused to act. The failure to take legal steps necessary to protect a title within the period authorized by law will justly divest a title. The appellant through his own default, and the default of his predecessor in interest, has lost his right and title. Even assuming an equitable right against the United States, Congress alone can provide the means by which it may be satisfied. The remedies which it provides are exclusive. It provided in the lieu selection law a remedy which was open to C. W. Clarke for three years after his selection was rejected. He did not take advantage of it. In 1922, after the rights of the San Joaquin Light & Power Corporation had intervened, his grantee was again offered a fair chance to complete the exchange. Again the remedy offered was neglected and rejected.

Substantially all public land statutes contain provisions requiring the claimants to be diligent in the proceedings by which they may acquire title. Under others of such laws, even though claimants had gone to great expense and had paid fees and purchase price, they were liable to lose both the lands and the sums paid in if they did not in the allotted time carry their proceedings through to final adjudication. In some cases where claimants did not act in good faith or permitted an element of fraud to enter they were denied the lands and were denied a refund of amounts paid in (29 L. D., 320; 29

L. D., 400; 29 L. D., 188). The terms of the act repealing the lieu selection law expressly denied the right to complete the transaction in cases where the selection failed for fault of the selector. There is no reason to assume that Congress meant to restore such delinquents to their original status or to make good their loss. In all these instances it is seen that there are substantial and meritorious defenses which might be interposed by the United States against an action which seeks to hold for naught the conveyance to the United States. *It is plain that the United States is entitled to a day in court on such matters.*

In so holding the court below necessarily formed and acted upon an opinion as to the nature of appellant's title. In the same breath counsel for appellant (Brief, page 16) declares this interest was and was not submitted to the judgment of the court. The court may look at his title long enough to take jurisdiction but not long enough to discover its infirmities. The court is asked (Appellant's brief, page 17) to look upon the "cloud" cast upon his title but not long enough to see that it is the interest of the United States which casts the shadow; not long enough to see that, in the nature of things, the only real injury is to land in California, giving venue to a suit, whether the action be for possession or to quiet title; not long enough to see that appellant is not in possession; and not long enough to see that no one in posses-

sion is yet disturbed by any act of appellees, or of the United States, or its licensee.

These appellees, sued as the Federal Power Commission and acting as such, have no control over the records of the General Land Office and no duty with respect to the title to the tract of land in controversy. It is beyond any power conferred upon them by Congress to rectify any mistakes or to adjudicate any controversy with respect to the ownership of said tract.

**Appellees have no personal interest in this controversy—
The United States is a necessary party**

Congress is the agency designated by the Constitution to have care of the lands of the United States. The appellees have not authority to convey the lands away or disclaim an interest in them except as expressly provided in acts of Congress. Nor can the courts assume to dispose of the lands or to direct their disposal by administrative officers of the Government except in accordance with the laws provided by Congress. The legal title to these lands appears to be in the United States, and Congress has acted in regard thereto with the assumption of full authority to dispose of the same. The appellees are officers of the United States, acting in the capacity imposed upon them by law as the members of the Federal Power Commission. Neither as individuals nor as such agency have they any interest in the lands, nor is such interest alleged in them. The license given by them reserves to the United

States certain rentals which are distributed according to law for various public purposes. The reservation of such rights, both in the land and in the rentals therefrom, makes obvious the interest of the United States in this suit. The United States is, therefore, a necessary party. It can not be made a party for want of consent of Congress and the case must, therefore, be dismissed.

New Mexico v. Lane, 243 U. S. 52.

Morrison v. Work, 266 U. S. 481.

Naganab v. Hitchcock, 202 U. S. 473.

North Dakota v. Lemke, 257 U. S. 485.

San Joaquin Light & Power Corporation a necessary party

A more serious obstacle to the prosecution of this suit is the absence of the San Joaquin Light & Power Corporation. The bill of complaint shows that an irrevocable license has been issued to said corporation, authorizing the acts which the bill of complaint alleges that said corporation intends to perform. The license is admitted to be valid on its face, and from what has been said there may be substantial defenses which could be set up to prevent its cancellation. This evidence of title in the said corporation is not substantially different, in the extent of its authorization, from a patent from the United States. Private individuals are without right and without standing in court to seek the cancellation of such a muniment of title.

Sawyer v. Gray, 205 Fed., 160.

It is clear that the San Joaquin Light & Power Corporation is the principal party in interest adverse to the plaintiff. It is sought in the absence of said corporation to strike down its rights in the said land. It is an indispensable party, and, without it as a party, the decree sought would be without legal effect.

Brady v. Work, 263 U. S. 435.

Commonwealth Trust Co. v. Smith, 266 U. S. 152.

New Mexico v. Lane, 243 U. S. 52.

California v. Southern Pacific Co., 157 U. S. 229.

Texas v. Interstate Commerce Commission, 258 U. S. 158.

If the decree of the court is not to affect the rights of the San Joaquin Light & Power Corporation, it can have no more effect than as a merely gratuitous legal opinion on the title, which is to be used to guide the court in which must eventually be raised the question as to the right of the San Joaquin Light & Power Corporation to occupy the said lands for the purposes of its reservoir. This is not a realization of the final adjudication of such matters that is contemplated by an equity suit. The effectiveness of the relief asked may determine whether the court shall entertain a suit and grant a remedy.

Iowa v. Slimmer, 248 U. S. 115.

The action requested is an exercise of discretion on the part of the Federal Power Commission in which it can not be controlled by the courts

If, as assumed by the appellant, the Federal Power Commission has authority to adjudicate controverted titles, its action requires the exercise of discretion on the part of said Commission to determine that the facts are as alleged and to ascertain what the law directs. In actions of this nature the Commission can not be directed by the court as to the manner in which its duty shall be performed.

Riverside Oil Co. v. Hitchcock, 190 U. S. 316.

French v. Weeks, 259 U. S. 326.

Brown v. Hitchcock, 173 U. S. 473.

United States v. Lane, 250 U. S. 549.

New Mexico v. Lane, 243 U. S. 52.

Appellant has adequate remedy at law

Appellant has mistaken his remedy. If he has a cause of action it may be prosecuted against the San Joaquin Light & Power Corporation in the State courts or courts of the United States in the State of California, and the presence of the United States, if in fact it has no interest, or these defendants, if their acts are void, is unnecessary to the determination of his rights or to a decree holding the said license to be void as to the said lands.

Daniels v. Wagner, 237 U. S., 547.

Minnesota v. Lane, 247 U. S., 243.

Counsel is in error (Brief, page 21) as to the effect, upon the license he wants rescinded, of a decree in the courts of California enjoining work under that license.

Appellant does not allege in his bill of complaint that as a matter of fact his remedy in California is not complete. He alleges only that he is so advised. This is not a sufficient allegation to deprive the courts of California of their jurisdiction over the title to said lands. There is no justification for the bringing of suit, to remove a cloud from the title to lands in the State of California, in the courts of the District of Columbia.

Issue of license is not a taking of the land

If this acceptance of title under a deed voluntarily given by the grantor of the appellant is to be regarded as "a taking" by the United States within the meaning of the fifth amendment, it is yet to be observed that a fair consideration was tendered on the basis on which the title was transferred to the United States. Unless appellant tried to obtain that consideration in accordance with the law, or unless he was refused it, he is in no position to say that his property is taken without compensation. But the bill does not allege the taking of any property of the appellant by the United States or by these appellees within the meaning of any constitutional provision. The acts alleged to have been committed by the appellees do not amount to "a taking." The appellees are not alleged to be in

possession or to be withholding possession from the plaintiff as was the case in *United States v. Lee* (106 U. S., 196). All that is alleged that related to "a taking" is that some other person, not a party to this suit, intends, at some future time, to take possession under authority of the license which has been issued by the Federal Power Commission. The issuing of a license under the Federal Water Power Act, including these lands, is not "a taking" and does not add anything to the cloud which was already upon the title by reason of the recorded deed showing fee-simple title in the United States.

Action requested of Appellees involves determination of claims of title. Federal Power Commission has no province in that particular

The Federal Power Commission is authorized (Section 3, paragraph 3, and Section 4 (d) of the Federal Water Power Act) to issue license covering public lands and "lands and interests in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws." Such license conveys and purports to convey no more than the actual interest owned and held by the United States. In this case the United States has the legal title even if this should be held to be a naked legal title and not an equitable ownership. It is provided by Section 10 (e) of the act that "each licensee hereunder shall be liable for all damages

occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto constructed under the license and in no event shall the United States be liable therefor." It is clearly left to the courts to determine, as the licensee proceeds, what rights of others may be invaded by him. The Federal Power Commission is vested with no authority and provided with no means for making such determination. It simply grants such rights as the United States may have or appear to have, leaving controverted matters to be settled by the courts if interested parties are unable amicably to adjust them. Not being a guaranty or representation of title, the license constitutes no cloud if there was in fact no title or interest in the United States.

For the appellees to pass upon such matters with any effect it would be necessary to call before the Federal Power Commission from the other side of the country all parties claiming an interest in any lands to be used in the project, to hear witnesses summoned from perhaps equal distances as to possession and many related matters, and to adjudicate questions of title which only the courts could conclusively determine. The Commission and its members were appointed for other purposes and have duties to perform which preclude them from undertaking or anticipating the functions of the courts.

IN CONCLUSION

Congress has seen fit to provide certain executive agencies to dispose of the "territory and other property of the United States." These agencies, acting in accordance with the law, have disposed of the lands in controversy as though they were, as the records show them to be, lands in which the United States had an interest. Whether the United States had such interest or not the executive officers were explicitly directed not to disclaim it. Appellees have no more power to grant relief to the appellant than has the Secretary of the Treasury. The adjustment of this transaction of exchange was an executive function to be performed in accordance with the conditions prescribed in the statutes and not otherwise. The courts can not perform such functions nor treat them as performed when neglected (*Dunlap v. United States*, 173 U. S., 65). Much less could they require those executive acts to be performed which Congress expressly forbids. Ministerial duties may be enjoined upon ministerial officers, but acts which the law prohibits can not be said to be ministerial duties.

Perhaps this court can follow, as the court below could not, and as we confess we can not, the subtlety which finds the question raised on the bill and motion to dismiss to be one not of law but of fact; and the question of fact to be: was the settled law what counsel thought it was. (Appellant's brief, p. 21.) To enlighten counsel is the only effect a decision

of this court can have, until the United States and its licensee the San Joaquin Light & Power Corporation are given their day in court to ascertain who owns the lands.

All of which is respectfully submitted.

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